

Andrew Kibblewhite and Peter Boshier

# Free and Frank Advice

## and the Official Information Act: balancing competing principles of good government

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### Abstract

Concern exists that New Zealand hasn't struck the right balance between two potentially competing principles of good government: officials should provide free and frank advice to ministers, and the public should have opportunities to participate in decision making and hold the government to account. Steps we have taken to address this include: strengthening constitutional underpinnings for free and frank advice (Cabinet Manual changes and issuing expectations for officials); a work programme to improve government agency practice in relation to the Official Information Act; and the Office of the Ombudsman reducing uncertainty about when advice can be withheld by issuing new principles-based guidance and providing more advisory services.

**Keywords** free and frank advice, stewardship, official information, Official Information Act, expectations

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It may seem novel that the chief ombudsman and the chief executive of the Department of the Prime Minister and Cabinet are writing an article together; however, this demonstrates our shared commitment to good government. For some time we have been discussing how to balance two principles that contribute to good government. The first is that public servants should provide free and frank advice to ministers. The second is that the public should have timely access to official information that enables them to participate in government decision making and hold the government accountable.

We both recognise the potential for tension between these two principles. If public servants give advice that is less than free and frank because of concerns about its public release, there is a risk to good government. This has led us to ask: to what extent can and should New Zealand's public servants expect their advice to ministers to remain confidential? In this

article we explore this and related questions from the different perspectives of our respective offices.

From the Prime Minister's Department perspective (and that of head of the policy profession), free and frank advice is crucial to government making good decisions, and achieving good outcomes for those who live in New Zealand. If concern about release of advice under the Official Information Act (OIA) discourages officials from providing free and frank advice – or ministers from seeking it – we need to address that. But we also need to use all the other means available to us to foster free and frank advice and open government.

In addition, chief executives are responsible for 'the stewardship of the department or departmental agency, including of its medium- and long-term ... capability, and capacity to offer free and frank advice to successive governments' (section 32(1)(c)).

In my role as head of the policy profession, I am working to build a common understanding of what this advisor role means for public servants. Some of the points I made in a series of speeches about free and frank advice between 2015 and 2017 (Kibblewhite, 2015, 2016) bear repeating:

For the record, I'm not suggesting that officials are the only experts who advise

And finally, we have the unique advantage of providing advice from the privileged position of being on the inside. We see the shifting sands that governments are navigating, how much room they have to manoeuvre, how stakeholders are reacting, what impacts the media narrative is having on their choices, and we have the chance to position our advice so it can be most effective.

For these reasons, an impartial and politically-neutral public service is one of the strengths of our system of parliamentary democracy: it combines deep expert advice with democratic responsiveness.

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From the chief ombudsman's perspective, the Official Information Act needs to operate with as much certainty as possible. The subject of 'free and frank advice' and when it might be protected or not is a difficult and uncertain matter for chief executives and ministers. Creating as much certainty as possible is desirable, because that promotes good government.

### Providing ministers with free and frank advice – Andrew Kibblewhite

Advising ministers has long been a crucial public service role in countries with Westminster-style systems of government. Our own State Sector Act 1988, as revised in 2013, legally defines the role of public servants as ministerial advisors. The act refers to the advisor role in two clauses. Chief executives continue to be responsible to the appropriate minister for 'the tendering of free and frank advice to ministers' (section 32(1)(f)). In

ministers, or that we are the only voices they should listen to – far from it. But our advice is important for a number of reasons. First, we are trained in how to offer analytically robust, practical, apolitical advice to ministers on achieving their goals. Our responsibility is to seek the best outcomes, not the political advantage of a party, faction, or particular sector of society.

Added to that, the best advisors build relationships with stakeholders inside and outside of decision-making circles so we are well informed about how different choices will play out in the real world. And we are a professional, permanent cadre of advisors. We've seen many policies implemented before, sometimes successfully, sometimes less so. We've learned lessons when policies implemented against our advice have succeeded and policies we've backed have failed.

In the policy context I believe the State Sector Act stewardship provisions also give public servants a duty to look ahead and provide advice about the future challenges and opportunities New Zealand faces. This includes at times offering hard-hitting advice to the government of the day that the current policy mix might not be working, or drawing attention to emerging factors that may require existing goals to be refocused or replaced.<sup>1</sup>

Providing advice that is free and frank about immediate and longer-term issues is a demanding ask – and it is an art as much as a science. So it is important that we understand what it means to be both free and frank as a policy advisor.

The 'free' in free and frank isn't the same thing as free speech. Public servants are entitled to their opinions, but it's not part of their day job to share that with anyone, anywhere. The free part of free and frank means that public servants offer their best advice freely to decision makers, without withholding any key evidence or information. Free also means we shouldn't second guess what ministers will want to do – it's about telling ministers what they need to hear, not what we think they want to hear.

Frank means we don't pull our punches with ministers. We are honest about where we think the pitfalls and risks are. However frank doesn't mean foolish. As in any relationship there are smarter ways of saying things – we need to give the hard truths in the most

constructive and palatable way possible. (Kibblewhite, 2016, p.4)

**Fostering free and frank advice and better public access to official information – Andrew Kibblewhite**

We have taken a number of steps, over the last few years, to bolster officials' understanding of their obligation to provide free and frank advice and ministers' understanding of their obligation to receive it. The Cabinet Office revised the Cabinet Manual in 2017 so that it now, for the first time, makes specific reference to the duty that ministers have, as the recipients of free and frank advice, 'to give fair consideration and due weight to free and frank advice provided by the public service' (section 3.8).

The state services commissioner, Peter Hughes, and I also took steps last year to strengthen public service and ministerial expectations regarding the supply of free and frank advice and policy stewardship. A working group led by the policy project team developed an expectations document which was formally issued by the state services commissioner in December 2017, along with a 'frequently asked questions' supporting document (State Services Commissioner, 2017a, 2017b). We engaged with ministers before finalising the expectations, and the prime minister has expressed her strong support for them.

The new expectations document makes it clear that public servants are expected to provide advice that:

- identifies the nature, scale and significance of the policy issue or opportunity (with supporting evidence);
- is politically neutral while also being aware of relevant political contexts;
- recognises the historic, contemporary and potential longer-term dimensions or conditions;
- is comprehensive, objective and balanced to cover the range of options that address the issue(s);
- is honest about where the opportunities, benefits, costs and risks of all options are, and about the limitations, assumptions and information gaps in analysis;
- is clear about any trade-offs involved and which option(s) on balance are recommended;

- delivers any hard truths in the most palatable way possible; and
- covers implementation issues. (State Services Commissioner, 2017a)

We have an active programme underway to inform public service advisors at all levels about the expectations about free and frank advice and policy stewardship, with the policy project team most recently holding forums for policy managers across the public service on the subject. I will continue to do all I can to ensure that officials understand what is expected of them, and are supported to deliver on those expectations.

I am also conscious of the need to strike the right balance between enabling

- improving access to official information by publishing responses to requests on government websites and developing principles for more proactive release; and
- supporting agencies to deliver by developing appropriate guidance and training. (Open Government Partnership New Zealand, 2016, p.11)

The steps outlined above underscore the commitment of the public service to lift our game on the transparency of government and in particular the OIA. We are working to put our house in order. To genuinely improve the environment for providing robust free and frank advice these steps need to be coupled with greater

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confidential consideration of free and frank advice, and enabling the public to access official information to support open government. The commitment made in the government's Open Government Partnership *National Action Plan 2016–18* to improve government agency practices around requests for official information under the Official Information Act is another important development. The State Services Commission and the Ministry of Justice are leading the actions being taken to deliver on that commitment by:

- ensuring that information about the OIA (how to make requests, etc) and responses to requests are easy to access on agency websites;
- publishing OIA statistics (how many requests, time taken to respond, etc);
- developing a clear statement of government policy on proactive release of Cabinet papers and related material;
- developing a suite of consistent measures about OIA performance;

certainty about the circumstances under which free and frank advice can be held in confidence. Advice does not occur in a vacuum, and at times public servants can be affected by the extent to which they can rely on their candid advice remaining confidential, particularly where they are expressing different views from those of the government. This is a subject the chief ombudsman and I have discussed at length over the last year.

**The policy settings that govern official information – Peter Boshier**

In the original design of Westminster-style government, public servants held a unique position as trusted and privileged insiders. The advice they provided was confidential: intended only for the eyes and ears of the politicians they served. In New Zealand, the Official Secrets Act 1951 sustained that position for over 30 years. The general rule was that official information should remain secret unless there was a good reason for releasing it. This meant that public servants could provide advice that challenged the

views of ministers, secure in the knowledge that it was unlikely to end up on the front page of the newspaper. A connection between the Official Secrets Act and the Crimes Act made it a criminal offence to release official information without approval.

The principle underpinning the Official Secrets Act was turned on its head with the passage of the Official Information Act 1982. The guiding principle became availability: official information shall be made publicly available unless there is good reason to withhold it.

The OIA identifies two good reasons for withholding official information that constitutes free and frank advice (colloquially known as the 'good

The second 'good government' reason for withholding official information is to maintain the effective conduct of public affairs through the free and frank expression of opinions – section 9(2)(g)(i) of the OIA. This section applies where release of the information would inhibit the future exchange of free and frank opinions that are necessary for the effective conduct of public affairs.

Both of the 'good government' reasons to withhold free and frank advice are subject to a public interest test: namely, that the need to withhold information is not outweighed by the public interest in its release. There are two matters of public interest that are particularly relevant here.

a shortage of free and frank advice: 'There is now, in my view, far too much second guessing by public servants of the political incentives on ministers – and too much pulling of punches in the provision of advice' (Palmer, 2013, p.2). He pointed to evidence supporting this from the research of Nicola White at the Institute of Policy Studies, published in the book *Free and Frank* in 2007. Nicola White concluded from her research that:

there is now reasonable evidence that:

- blunt advice is offered less easily, and obfuscation and softer language are widely preferred;
- wide-ranging advice is restricted, with written documentation tending to stick to the safe middle ground and more adventurous thoughts being tested in discussion;
- if issues are delicate or difficult, they are dealt with orally;
- many people working at the centre or at sensitive levels of government work largely without creating records and, for example, will avoid email completely because of a lack of any assurance that their comments could be protected;
- documents that are clearly going to become publicly accessible tend to be written with that fate in mind, so they do not contain anything that could attract a headline or create a story in itself – the 'front page of the *Dominion* test' is becoming a public service norm equal in status to 'no surprises for the minister'; the public record suffers from incomplete documentation and from papers that are written for the record rather than for the moment;
- relationships can be damaged when people, particularly ministers, perceive a group of officials to be 'writing for the record' or 'setting them up' by creating paper trails;
- dissection of the exact role of officials and ministers in any overall piece of government policy work or decision-making can destabilise relationships, and create intrigue out of the ordinary business of supporting a politically responsible executive; and

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government' provisions), in sections 9(2)(f)(iv) and 9(2)(g)(i). These provisions reflect the view of the Danks committee (whose recommendations led to the OIA) that 'to run the country effectively the Government of the day needs nevertheless to be able to take advice and deliberate on it, in private, and without fear of premature disclosure' (Committee on Official Information, 1980, p.19).

The first of these 'good government' reasons for withholding official information is to maintain the constitutional convention protecting the confidentiality of advice tendered by ministers and officials – section 9(2)(f)(iv) of the OIA. This section usually applies where the release of confidential advice given to ministers or Cabinet would hinder the orderly and effective conduct of government decision-making processes. Generally this section of the OIA only provides grounds for temporarily withholding the release of free and frank advice.

The first is holding public servants to account for the advice they provide to the government, and holding ministers to account for the decisions made on that advice. The second is enabling public participation in the development and administration of laws and policies. The OIA balances the public's right to know with the government's need to receive the free and frank advice required to make good decisions.

### Concerns about the practice of free and frank advice – Andrew Kibblewhite

In the last decade, a number of commentators have expressed concern that despite the 'good government' provisions of the OIA, the presumption in favour of releasing official information has had unintended consequences for the provision of free and frank advice.

In 2013, Matthew Palmer gave an address to the Public Service Association and Fabian Society in which he pointed to

- the fishbowl nature of working at senior levels in the public service appears to have made it more difficult to attract and retain staff. (Wright, 2007, p.271, quoted in Palmer, 2013, pp.2–3)

More recently there have been media reports about the preliminary results from a questionnaire that Chris Eichbaum of Victoria University and Richard Shaw of Massey University distributed through the New Zealand Institute of Public Administration. They received 640 responses, with more than 80% from individuals employed in the state sector. More than half of the respondents (53%) indicated some agreement with the statement: ‘Public servants in 2017 are less likely to provide a minister with comprehensive and free and frank advice’ (Eichbaum, 2017).

In regard to reversing this trend, Matthew Palmer has expressed the view that we should ‘insist that Ministers, and public servants, harden up. If the job is to give free and frank advice then that is what public servants have to do and Ministers have to like it.’ He envisaged this attitudinal change being achieved through leadership. ‘Both at senior political and senior bureaucratic levels, there would need to be a formal acknowledgement that our system of government and constitution values free and frank advice as an objective and that a paucity of it is a problem’ (Palmer, 2013, p.6).

My own experience is that much free and frank advice is still given by officials – the art is far from dead. But I do concede that we have become less diligent about documenting that advice, and documentation matters. Without it the rigour of analysis is weakened through less exposure to subsequent scrutiny. The basis of decisions can also become lost with the passage of time and the Crown’s ability to defend its decisions, if challenged by way of judicial review, is weakened.

So what to do? I agree that Matthew Palmer’s prescription – that officials and ministers need to ‘harden up’ – is part of the remedy. Robust advice provided to ministers on the merits of a proposal should first be given, then appropriately released – ideally proactively, at a time that

will most usefully support the public’s understanding of the policy decision. As discussed above, we have taken a number of steps to make sure officials understand what is expected of them in this regard.

I am, however, firmly of the view that ‘hardening up’ is a necessary but not sufficient condition. Ministers and senior officials also need to have confidence that some advice – particularly early stage (often discretionary) advice that might directly challenge policy settings or the ideological priors of the minister – can be given and received in confidence. While the free and frank grounds for withholding advice offer some protection for this sort

of discourse, neither ministers nor officials have felt confident in how those grounds will be applied. This uncertainty is damaging for good decision making because over time it has a chilling effect on the provision of free and frank advice. It is to the great credit of the chief ombudsman that he has acknowledged the important role his office plays in creating certainty for policy practitioners, and has taken steps as set out below.

#### **Clarifying the application of the OIA’s ‘good government’ provisions – Peter Boshier**

The OIA has lately attracted attention related to whether or not the act is effective, whether it is applied efficiently, and whether reform is required. For the most part, the provisions of the act are clear. However, commentators have long recognised the elusive nature of clarity in relation to this area of law (in sections 9(2)(f)(iv) and 9(2)(g)(i) of the OIA). For example, the Law Commission considered the ‘good government’ grounds in its 2012 review of the OIA, and recognised that they are among the grounds that cause the most

difficulty for those who request and hold official information (Law Commission, 2012, p.50).

There are two major contributions I can make in this area:

1. clearly stating my view – and therefore the lead I give to my office – on how the OIA provisions relating to free and frank advice should be applied. To achieve this, I have recently published detailed guides on the grounds for withholding free and frank and confidential advice to the government, and how they should be applied to information generated in the public policymaking process (Office of the

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2. making my office more available to officials faced with an official information request who are unsure whether the withholding of information is justifiable. I want my office to be known not just for investigation and recommendation, but also as a first stop for advice and guidance before a decision is made.

I am keen to achieve greater certainty, and I think it can be reached on a principled basis. Of course, one should never prejudge the outcome of any complaint. But just as with court work and litigation, it makes sense for officials planning to adopt a particular response to an OIA request to know what they are heading into and what the outcome might be. I have therefore instructed my office that we must be bold in giving that clarity, while still preserving our ability to investigate fully if required, and deliver an opinion and make recommendations if we think that an error has occurred. Over time, this initiative should result in a reduced need to make recommendations, as officials better understand the circumstances in

which withholding free and frank advice is permissible.

A crucial element of good government is the ability of a chief executive or their staff to be able to give honest and fearless policy advice on an issue to ministers at an early stage. Ultimately, the soundness of the decision made (and converted into policy and statute) may depend on an initial robust analysis of what a problem is thought to be and what the best solutions seem to be. This is a fundamental aspect of democracy and must not be lost.

For this reason, where discussion and advice is at a very early stage – it is exploratory, or 'blue skies thinking', or

reference, and the development plan or stages of policy development ahead (including timeframes for any public consultations and final decisions).

The third phase of the journey will involve reasonable certainty of the route and likely destination. By this time I think the principles of participation in democracy should weigh heavily. This is the chance for the public to know about policy and contribute to its development. Disclosure of any firm options being considered would usually fall within this phase. Detailed advice on the options may require protection to enable the free and frank exchange of opinions and

I hope that my explanation of what is appropriate at each stage in the process and my reflections on the importance of the beginning phase help to create the certainty that I am looking for. If it is less clear where in the continuum policy advice is at, reasonable certainty can be instilled through a candid discussion with my office to obtain an objective view on whether information can be protected at that time or not.

#### Conclusions – Andrew Kibblewhite and Peter Boshier

Good government requires officials to be able to provide free and frank advice to ministers in confidence. And it requires the public to have opportunities to participate in decision making and hold the government accountable for its decisions. Getting the balance right between these two principles matters, as too much of the latter may result in less of the former, and vice versa. Between us, we have been actively using any means in our power to foster free and frank advice, while also encouraging open government.

From inside executive government it has been necessary to strengthen the constitutional underpinnings that influence how free and frank advice is delivered and received. We have done this through recent changes to the Cabinet Manual and by issuing formal expectations for chief executives. Government agencies also need to get better at dealing with public requests for information in a timely fashion. We both support the programme of work underway to achieve that.

We agree that the path to fostering free and frank advice involves the chief ombudsman and his office creating as much certainty as possible on how the 'good government' provisions of the OIA are applied. This greater clarity will be provided by the new guides on those provisions and the office's better availability to give advice at the start – in both cases, being as thorough as possible about the relevant factors relating to this area of official information.

We hope our collective efforts to clarify expectations of officials and to improve certainty and confidence in the application of the OIA can enhance the appetites of both ministers and officials to receive and offer challenging stewardship advice – 'blue

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deliberately provocative – it ought to be protected. If that is not the case, the chilling effect of the release of early stage free and frank advice on the provision of such advice may undermine the integrity of this decision process.

If I liken this approach to a potential journey with four phases, the first phase is alerting the minister that a journey may be needed, and indicating some possible routes. It is impossible to say at this early stage whether the journey will actually take place, or if it does what route the journey will take. If the minister indicates potential interest in embarking on this journey, the second phase is becoming clearer as to what the destination might be.

During these early stages, advice is more likely to require protection on the basis that disclosure would prejudice the future free and frank exchange of opinions necessary for the effective conduct of public affairs. However, general information could be released at this time about the policy's scope or terms of

orderly conduct of the decision-making process. However, a brief outline of options can usually be disclosed without undermining those interests. This allows the public to participate in the decision-making process by offering a contestable stream of advice.

Finally, at phase four, where the journey is all but complete, there should be certainty that information will be released unless some wholly different withholding ground can be established. The strong public interest considerations that favour disclosure would be accountability and transparency of the decision on which option was chosen, the advice provided and reasons why that decision was made.

So, when officials are considering how to apply the 'good government' withholding provisions of the OIA to their free and frank advice, they must always be able to illustrate where in a governmental decision process information is being generated and for what purpose.

skies thinking’ – that comes early in the policy process. Our aspiration is that both requesters and the agencies and ministers who receive the requests can operate with increasing confidence. This will enable them to increase their speed in handling requests and disclosing information, or to know when withholding is more clearly justified.

We now wait with interest to see what impact these initiatives have on both the provision of free and frank advice and the release of official information to the public. We anticipate that the balance between the two will continue to evolve, as citizens expect to be more involved in the design

of policies and services, and as enabling digital and other technologies emerge.

1 The guidance on policy stewardship issued by the State Services Commissioner in December 2017 explicates this understanding (State Services Commissioner, 2017a, 2017b).

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