A SURVEY OF MINISTERIAL COMPLIANCE WITH THE OFFICIAL INFORMATION ACT 1982

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Abstract

There are long-standing calls for reform of the Official Information Act 1982. We aim to supply a partial empirical basis for understanding these calls through a survey of ministerial compliance with the Act. We requested quantitative and qualitative information from 26 Ministers about their decisions during a three-month period to withhold requested information on the grounds that the information is, or will soon be, publicly available. We focused on this specific withholding ground because proactive disclosure is a burgeoning issue globally but is not addressed directly in the Act. This article presents our conceptual framework and methodology before setting out a summary and analysis of the results of our survey. While any conclusions drawn must be treated as indicative rather than determinative, we find that there was generally good compliance with the Act although some instances of noncompliance appeared to be serious and unjustifiable. We hope this survey contributes to debate and discussion about appropriate legislative reform.

I Introduction

There are long-standing calls for reform of the Official Information Act 1982 (the Act).[1] These calls are based on a perceived need to update legislation that is now 40 years old, and anecdotal evidence of basic compliance failures by those subject

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1 See, for example, Geoffrey Palmer "Outdated and Increasingly Toothless, the Official Information Act Needs an Overhaul" (30 May 2017) The Spinoff <https://thespinoff.co.nz>.

to the Act's requirements.[2] In this article we seek to test the merits of these calls in a limited but empirical way through a survey of compliance with the Act at the ministerial level. We submitted a standardised request for information to each of the New Zealand government's 26 Ministers regarding refusals to supply information on specific grounds during the threemonth period between 1 April 2021 to 30 June 2021. We are not aware of any empirical survey of this kind being undertaken at the ministerial level, and so our results provide new indicative evidence of compliance with the Act at the highest political levels of government. Both compliance with our standardised request and the information supplied in response to our request give empirical support to the perception that compliance with the Act is variable, although it remains a matter of judgement whether this variability is sufficiently serious to warrant fundamental reform.

Our standardised request focused specifically on refusals to supply information under s 18(d) of the Act, which provides that a request for information may be refused on the basis that the information requested is or will soon be publicly available. There were two reasons for our focus on this under-studied provision of the Act. The first was an anecdotal impression that requested information is often withheld under this ground but is not actually released within an appropriate timeframe. In the context of the ongoing COVID-19 pandemic, for example, there have been informal allegations that the timing of release of information has been used to serve the ends of political expediency when genuine compliance with the Act would have compelled release much sooner. The second reason for our focus on s 18(d) is that proactive disclosure is an area for possible reform under any review of the Act. Governments around the world now generate and store much greater amounts of information, and proactively release more of that information more often.[3] We wanted to determine, in a preliminary way, whether changing practices around proactive release might be a cause for concern.

Overall, our survey did reveal some concerning practices around reliance of s 18(d), and this seems to reinforce the view that better guidance for proactive disclosure is necessary. There was considerable variation in the timeliness of responses, with several Ministers failing to meet deadlines, and two ministerial offices providing no substantive response at all. The qualitative responses we received suggest that Ministers are generally alive to the expectations and issues related to proactive disclosure of information. However, responses also showed some concerning timelines regarding the subsequent release of information

2 See the examples from journalists, MPs and officials listed in Steven Price "The Official Information Act 1982: A Window on Government of Curtains Drawn?" (New Zealand Centre for Public Law, Victoria University of Wellington, Occasional Paper 17, 2005) at 3–5.

3 See section II B below.

withheld under s 18(d), as some information had still not been released eight months after the request had been made. This raises serious questions about the legitimacy of ministerial reliance on s 18(d). An aspect of government practice that our survey unexpectedly revealed was inconsistency in record-keeping among ministerial offices. The Public Records Act 2005 requires that ministerial offices create and maintain full and accurate records of their affairs that are accessible for subsequent reference.[4] We were surprised to find that some ministerial offices refused to supply information we requested on the basis that the information was inaccessible, not retained, or did not exist when other ministerial offices did provide the equivalent information. The relationship between the Official Information Act and the Public Records Act is an important one for ensuring that requested information can be made available. Again, compliance at the ministerial level appears to be variable based on the responses we received. This may be an area that requires further consideration if reform proposals are seriously contemplated.

We recognise that our empirical survey is limited. This in part reflects the (appropriate) limits of the Act for comprehensive survey purposes. It would place a disproportionally large burden on ministerial offices to request extensive compliance information, and any such request would likely be refused.[5] Further, we recognise that contextual factors may explain variable compliance in some circumstances and that this may be appropriate. We sought qualitative as well as quantitative information as part of our standardised request in an attempt to account for this, but we concede that we still cannot have access to the full context in many cases. Our empirics therefore need to be interpreted with caution. Nevertheless, we consider that our results can usefully inform further debate on the adequacy of the Act in its current form, if only in a preliminary way. The inconsistency among ministerial offices in the responses to our request suggests that a culture of compliance with the Act has not fully developed, as the exercise of political judgement when responding to a request is likely to be the decisive factor. This is potentially of significant concern, and ought to be investigated further as part of any reform proposals.

We also wish to acknowledge that since this article was completed, there have been developments regarding proactive release obligations at the ministerial level. In May 2022, Minister for the Public Service, Chris Hipkins, released a document titled *The next steps in the public release of official information*.[6] Within this document, the Minister outlined the approach towards improving record keeping and the

4 Public Records Act 2005, ss 17(1) and (2).
5 Official Information Act 1981, s 18(f).
6 Chris Hipkins *The next steps in the public release of official information* (17 May 2022) Te Kawa Mataaho Public Service Commission <https://www.publicservice.govt.nz>.

proactive release of government information. This publication shows ministerial awareness of the importance of making government information more accessible, and we hope that the results of our survey can further encourage discussion on this topic.

In the following section, we examine the public policy purposes of the Official Information Act to provide the theoretical context for our empirical survey. We specifically examine the issue of proactive disclosure and modern accounts that put emphasis on addressing this lacuna. Part III then sets out the methodology of our survey. Part IV presents the result of our survey and seeks to draw insights from the data on compliance with the Act. Part V draws the threads of our analysis together.

II. The Context: Freedom of Information

The Official Information Act exists in a political context that recognises freedom of information as a vital feature of modern democratic government. In this section we seek to frame the context for our survey by explicating this political context and analysing how the Act aims to serve the goals of openness and transparency. We also examine the contemporary importance of proactive disclosure for effective freedom of information regimes and the awkward fit between proactive disclosure and the operation of the Act.

A. The General Context: Freedom of Information

Internationally, there has been a discernible trend in recent decades towards the view that transparency is an essential feature of modern government,[7] where transparency can be taken to mean the "conduct of public affairs in the open or otherwise subject to public scrutiny".[8] Where increases in transparency allow the public access to government information the benefits can include greater accountability, increased trust, and reduced opportunities for corruption.[9] As a result of the development of this line of thinking, statutory access to information

7 See generally Toby Mendel *Freedom of information: a comparative legal survey* (2nd ed, UNESCO, Paris, 2008); and Christopher Hood and David Heald *Transparency: The Key to Better Governance?* (Oxford University Press, Oxford, 2006).

8 Patrick Birkinshaw "Freedom of information and openness: Fundamental human rights?" (2006) 58 Administrative Law Review 177 at 189.

9 Stephan G Grimmelikhuijsen and Albert J Meijer "Effects of Transparency on the Perceived Trustworthiness of a Government Organization: Evidence from an Online Experiment" (2014) 24 Journal of Public Administration Research and Theory 137.

regimes are now commonplace internationally. In New Zealand, the primary access to information regime is set out in the Official Information Act 1982.[10]

The Act came into force 40 years ago, and so in many respects was at the vanguard of this modern trend. In a New Zealand context, the Act represented a stark change in policy away from a presumption of secrecy towards a principle of availability.[11] If information is requested from the government, that information must be made available to the requester unless there is good reason for withholding it.[12] The benefits of this approach largely reflect the international literature on good government and transparency: to enable effective participation in the administration of government,[13] and to hold government decision-makers accountable.[14] These two major policy justifications were clearly anticipated in the Danks Report,[15] which led to the enactment of the Act, and were reiterated in the more recent review of the Act undertaken by the Law Commission.[16]

It is notable that the Act, the Danks Report and the Law Commission all list public participation ahead of government accountability when outlining the purposes of the New Zealand freedom of information regime. In popular discourse, government accountability seems to be the policy objective that receives far more attention. This may be because specific requests aimed at government accountability raise the political stakes, which can (anecdotally at least) impact on compliance. Opposition politicians and their surrogates, and the news media often make requests that would fall more naturally under the rubric of political accountability – they want to know what the government is doing and how it is performing so that they have an evidential basis for critique and (sometimes) complaint. A perceived resistance from government officials to fully comply with such requests on a timely basis underpins most of the more vocal complaints against the Official Information Act regime.

The reasons for, and practice of, refusing to comply with requests for information are therefore crucial aspects of how the Act operates at a descriptive level and how successfully it performs at a normative level. There are several dimensions to unpack here. The Act sets out conclusive reasons for withholding information largely on national interest grounds such as national security, economic stability and maintenance of the law.[17] It also sets out a list of presumptive reasons for

10 We do not specifically examine the Local Government Official Information and Meetings Act 1987 in this article.
11 The Act replaced the Official Secrets Act 1951.
12 Official Information Act 1982, s 5.
13 Official Information Act 1982, s 4(a)(i).
14 Official Information Act 1982, s 4(a)(ii).
15 New Zealand Committee on Official Information *Towards Open Government* [Danks Report] (Government Printer, Wellington, 1980) at 14.
16 At 18.
17 Official Information Act 1982, s 6. See also s 7 with respect to the Cook Islands, Tokelau, Niue and the Ross Dependency.

withholding official information.[18] By way of example, these include reasons relating to personal privacy, protection of legitimate commercial interests, the maintenance of constitutional convention, and the effective conduct of public affairs. These presumptive reasons for withholding information are displaced where "the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available".[19] There is, therefore, a need to actively consider where the public interest balance lies as between provision or withholding of official information in respect of each request. Finally, the Act sets out a number of "administrative" reasons for withholding official information.[20] These administrative reasons include that the information is or will soon be publicly available, that the information does not exist or cannot be found, and that the information cannot be made available without substantial collation or research.

The principles underlying each of these reasons for withholding requested information are aimed at the maintenance of effective and efficient government. While transparency and openness in government is important, there is an understandable concern that this does not come at the cost of elected officials and their advisors in the public sector being inhibited from performing the essential tasks of government administration. For example, in respect of refusals to supply requested information on the grounds that the information will soon be publicly available in any case, the Danks Report made it clear from the very start that "premature disclosure" would risk the effective operation of government.[21] However, it is equally clear that effective administration is not to be conflated with political convenience. Instead the position is very clear that "[t]he fact that the release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public".[22] Indeed, we can perhaps go further than this and note that if there is a genuine reason for acute political embarrassment then the public interest in disclosure of that information is likely to be high. To the extent that officials seek to rely on the presumptive reasons for withholding under the Act, the public interest balancing exercise those officials are required to undertake is likely to strongly point towards an obligation to release the information.

It is also notable that the tension between the general principle of availability and specific grounds for withholding requested information is resolved in practice

18 Official Information Act 1982, s 9(2).
19 Official Information Act 1982, s 9(1).
20 Official Information Act 1982, s 18.
21 The Danks Report, above n 15, at 19.
22 At 19.

through the exercise of political judgement rather than definitive rules. This was a deliberate design choice. Officials faced with a request for official information are required to exercise judgement as to whether there are good grounds for refusal, which are primarily criticised in political terms. The Ombudsman does exercise jurisdiction to hear complaints and make recommendations to better promote compliance,[23] and there are limited examples of the courts ensuring a degree of legal accountability.[24] Legalistic interpretations are to be avoided.

Political judgement is relevant to the practical operation of the Act in two ways. The first way is that the Act is a permissible rather than a mandatory regime. The Act does not create any obligation on government officials to withhold information, it only provides permissible reasons for doing so. In this respect, every decision to refuse to supply requested information is a political decision involving the exercise of judgement in the circumstances. The second way that political judgement is exercised, and the more high-profile of the two, lies in the specific decision to refuse to supply requested information. The stated grounds for withholding often turn on the need to apply vague terms in context, or to balance competing interests. Further, there is often no immediate avenue to check the veracity for any stated grounds for refusal. This causes a degree of frustration where there is a belief that a strong public interest in disclosure is ignored in favour of the political convenience of withholding the information.

A political approach to compliance might strike many as odd. Politicians do not always benefit from access to information regimes, not least because those regimes:[25]

> ... limit the range of actions that elected and unelected political actors can take to pursue survival in office and limit the extent to which political actors can obfuscate on policy matters.

It is therefore difficult to understand why the public should trust politicians who determine their own compliance with freedom of information requirements. Daniel Berliner offers a partial solution to this dilemma by pointing out that robust access to information regimes can benefit politicians over the long term, particularly where former incumbents find themselves in opposition.[26] Berliner develops this insight with reference to the passage of access to information laws, but the same dynamic

23 See, for example, *Kelsey v Minister of Trade* [2015] NZHC 2497, [2016] 2 NZLR 218.
24 Official Information Act 1982, s 28.
25 Daniel Berliner "The Political Origins of Transparency" (2014) 76 The Journal of Politics 479 at 480.
26 At 480.

would appear to influence political practice once such regimes are enacted. In any case, there is a degree of political accountability to match the political judgement exercised when determining compliance with the Act. While public frustration when information is withheld is often framed as a criticism, this same public frustration actually represents an important sense in which the Act *is* working as intended. The public criticism and political pressure that comes from refusing to release information apparently in the public interest is part of the accountability function that the Act represents. We, of course, concede that this will be of little comfort to many high-profile requesters such as Opposition politicians and members of the news media, who may quite justifiably feel that their efforts to hold the government to account directly on substantive matters have been frustrated. But it is in these political interactions that compliance with the Act is driven.

This does raise questions about critique and assessment, and therefore possible reform, of the Act especially where there is a perception that 'soft' political accountability mechanisms are less than adequate. A move from a policy of secrecy to a practice of official discretion and political convenience could amount to a distinction without a difference if it is not applied within a culture of compliance and availability. What standards should we use to assess the credibility of the Act as it operates in practice? One set of standards relates to the firm legal obligations that do apply. These tend to have a procedural rather than a substantive focus. For instance, there are clear legal rules that apply to who may make requests and how those requests are made,[27] how decisions on requests are made (including timeframes),[28] and how information may be made available.[29] A failure to comply with these minimum standards clearly indicates issues with the freedom of information regime that ought to be addressed.

Measuring and assessing substantive compliance is more complex. There is an uneasy tension between a rational expectation of observable standards being satisfied with political judgement and discretion in all areas of public sector performance.[30] But the political approach New Zealand has taken to the Act exacerbates the tension. A number of approaches have been adopted internationally. These include selfpublished indicators, large-scale analysis of standardised requests,[31] and more

27 Official Information Act 1982, s 12.
28 Sections 15 and 15A.
29 Section 16.
30 See Donald P Moynihan and Sanjay K Pandey "Testing How Management Matters in an Era of Government by Performance Management" (2004) 15 Journal of Public Administration Research and Theory 421; and Patria de Lancer Julnes and Marc Holzer "Promoting the Utilization of Performance Measures in Public Organizations: An Empirical Study of Factors Affecting Adoption and Implementation" (2001) 61 PAR 693.
31 For example, Price, above n 2.

qualitative, discursive examinations that focus on systemic outcomes or impact.[32] Each of these methods has short-comings, and none provides a complete picture. Our approach has been targeted use of a standardised request, an approach we more fully explain and justify in the next section.

At the time of its enactment, New Zealand had a best-in-class freedom of information regime.[33] It still seems that in an international context New Zealand's Official Information Act "is widely regarded as a model of how progressive access to an information regime should work".[34] It seems clear that the Act is of more than "symbolic" value,[35] and contains a meaningful framework to promote the availability of information. This should provide some confidence, but continued assessment is required so that we do not rest on our laurels. This is particularly the case where the evolution of technology and government practice means that the scheme of the Act may no longer be fit for purpose. We examine one possible example of this in the following sub-section.

B. The Specific Context: Proactive Disclosure

While not a recognised feature at the time the Act became law, proactive disclosure is now a key aspect of the theory and practice of information access regimes. There have been two core drivers of this change.

One core driver is technological. Developments in information technology have enabled the storage and organisation of vast amounts of information and have provided the means for distributing that information over the Internet in a universal, open access manner.[36] Proactive disclosure is possible now in a way that it was not previously. The second core driver is political. While proactive disclosure can be framed as a means of increasing transparency, the political motivations would often seem to be more self-serving. This might be relatively benign: proactive disclosure of sought-after information may be a means of reducing the administrative burden that comes with multiple requests for the same information. Where systemised, it

32 For example, Nicola White *Free and Frank: Making the New Zealand Official Information Act Work Better* (Institute of Policy Studies, Wellington, 2007).

33 The comparison in Rick Snell "The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand" (2000) 28 Federal Law Review 575 is instructive. For an early comparative account, see also Robert Hazell "Freedom of Information in Australia, Canada and New Zealand" (1989) 67 Public Administration 189.

34 Robert Hazell and Ben Worthy "Assessing the performance of freedom of information" (2010) 27 Government Information Quarterly 352 at 353.

35 Jeannine E Relly and Meghna Sabharwal "Perceptions of Transparency of Government Policy Making: A CrossNational Study" (2009) 26 Government Information Quarterly 148 at 154. On some of the challenges presented by technological change of this kind, see Jessica White "Towards Electronic Democracy: The Impact of Technological Change on the Official Information Act 1982" (2003) 34 VUWLR 609.

36 Darrell M West "E-government and the Transformation of Service Delivery and Citizen Attitudes" (2004) 64 PAR 15.

may also lead to better information management practices, including with regard to the creation and maintenance of efficient records. This can lead to efficiencies within government concerning the production and use of information. To an extent, this benefit of proactive disclosure regimes replicates or complements official record keeping obligations. In New Zealand, for example, the Public Records Act 2005 places obligations on public office holders to create and maintain accessible official records, in accordance with normal, prudent business practice.[37] However, it is important to recognise that proactive disclosure can also serve as a tool of political control. Managing when information is released can allow governments and officials to better influence the narrative around their own policy choices and performance. It is therefore not surprising that governments see real benefits to proactive disclosure.

Leaving cynicism to the side for the moment, there are also public interest benefits that can result from proactive disclosure. Helen Darbishire suggests these benefits fall into four categories: rule of law, accountability, participation in government, and access to government services.[38] Rule of law benefits relate to the public accessibility of laws and regulations, enabling citizens to better understand their legal obligations. Accountability and participation benefits deepen the policy goals of access to information regimes more broadly. Obviating the need to actively request information potentially removes a barrier to the realisation of these important goals. Finally, improved access to government services is a collateral benefit of the increased use of information technology within government. Citizens are able to self-manage filing of tax returns or applying for permits without the need to directly engage bureaucratic procedures.

As a result of these political and public interest benefits, and technological advances, proactive disclosure is increasingly incorporated into access to information regimes around the world. It is notable that proactive disclosure is a feature of many 21st century regimes that have been enacted after New Zealand adopted the Official Information Act. Examples include the United Kingdom's Freedom of Information Act 2000, Mexico's Law on Transparency and Acct to Public Information 2002 and India's Right to Information Act 2005. Where regimes with a similar vintage to that of New Zealand have been updated, they often include provisions that address proactive disclosure obligations.[39]

In New Zealand, the Official Information Act does not include obligations around proactive release of information. Nonetheless, proactive disclosure can and does

37 Public Records Act 2005, s 17.
38 Helen Darbishire "Proactive Transparency: The Future of the Right to Information?" (World Bank, Washington, 2010) at 9–14.
39 See, for example, Freedom of Information Amendment (Reform) Act 2010 (Australia).

occur in New Zealand in a number of ways. In the first place, the government can simply release information. Not only is there no general prohibition on proactive release, but all Cabinet and Cabinet committee papers are required to be proactively released within 30 business days.[40] Such releases are technically not subject to the Act, but a government practice appears to have emerged in New Zealand so that any release will be on terms broadly consistent with the operation of the Act. So, for example, redactions may be made to proactive releases so that information is withheld in a manner consistent with s 9.[41] A second example of proactive disclosure is if there are good reasons for withholding under s 9, but the government releases that information in any case. There is no mandatory requirement to withhold information, only justifiable grounds for doing so. A third example is that the government may provide information beyond that requested. This might be done in consultation with the requester, for instance, in a proactive attempt by officials to provide the requested information where the initial request is overly broad or unclear. So, in practice, the benefits of proactive release may be realised, at least in a limited and informal way.

But proactive disclosure impacts on the operation of the Act in other ways. This interaction is a result of s 18(d), which provides that requested information may be withheld where "the information requested is or will soon be publicly available". It has been suggested that the primary reason for s 18(d) is to avoid wasting officials time completing requests.[42] This makes a good degree of sense where the information is already in the public domain and is accessible, or where widespread, unconditional release is imminent.[43] However, the practical impact of s 18(d) needs to be understood in light of the anecdotal view that the government of the day or officials sometimes use delaying tactics to control the political impact of information.[44] The point of delay in such cases is to ensure the information is no longer newsworthy.[45] While not always the case that the newsworthy nature of the information will change, the government has a greater opportunity to control the narrative where it is in charge of release. For example, the government may wait

40 For example, Cabinet Office Circular "Proactive Release of Cabinet Material" (23 October 2018) CO 18(4).

41 There is, of course, never likely to be perfect alignment between a request for information and justified reasons for withholding under s 9. The public interest balancing under s 9 cannot be undertaken in the abstract, only in the context of a specific request. As a result, proactive redactions may increase requests for information in some circumstances.

42 Ian Eagles, Michael Taggart and Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 243.

43 At 246.

44 White, above n 32, at 52, 92.

45 See Price, above n 2, at 12.

until an inconvenient time for release (Christmas Eve), bury the information in a mass release, or proactively release to particular interests ahead of the requester.[46]

In our view, s 18(d) could be misused in a similar way because of similar political impulses. Indeed, it would appear to provide a veneer of legitimate cover to engage in such delay. This is, of course, not at all the intended purpose of the provision or how it should be used. The Ombudsman's interpretation of the scope of this provision is quite narrow. There are two relevant aspects here. The first is one of timeframe. The Ombudsman recommends that s 18(d) should only be used for information that is predicted to be released within eight weeks of the refusal.[47] The second is one of purpose. Section 18(d) should only be employed because it would be administratively impractical to supply the information early. Steven Price gives the example of the information being delivered to a third-party printer, which would be cumbersome to pause or undo.[48] Outside of situations where for administrative reasons release is simply impracticable, s 18(d) ought not to be engaged.

That said, however, there is no standard of proof that must be met before s 18(d) is engaged.[49] An assertation that the relevant state of affairs – imminent release – exists is sufficient. This makes the "soon to be released" aspect of s 18(d) in particular quintessentially subject to the political judgement regarding compliance that is problematic within the scheme of the Act, and in our view potentially ripe for abuse. Part of the impetus for our study was to generate insights into whether there is evidence of such potential abuse at the ministerial level, which explains why our standardised request focused on refusals under s 18(d). We set out our approach in respect of the standardised request in the following section.

III. The Methodology: Our Information Request

Against the theoretical context set out in section II, our goal was to assess ministerial compliance with the Official Information Act, and with s 18(d) in particular. Our approach was to issue to each government Minister a standardised official information request. This group was made up of 24 Labour Party Ministers and two Green Party Ministers, due to the cooperation agreement between the Green Party and Labour Party concluded after the 2020 general election.

46 At 13.
47 Office of the Ombudsman *Publicly Available Information: A Guide to Section 18(d) of the OIA and section 17(d) of the LGOIMA* (August 2019) at 6.
48 Price, above n 2, at 36.
49 Eagles, Taggart and Liddell, above n 42, at 131.

We are not the first to attempt to use the access to information legislation to gain empirical data on which to draw conclusions about the operation of that same legislation. The international literature is replete with examples.[50] The most significant previous work in New Zealand to undertake this approach of which we are aware was undertaken by Steven Price.[51] Price's data was obtained by requesting:

- the 10 most recent information requests received and the responses to those requests;
- the 10 most recent requests and responses where information was withheld;
- the five most recent requests and responses where a time limit extension was sought; and
- the five most recent requests and responses where the Minister or ministerial office was consulted.

Price's approach is necessarily limited in the sense that it is interpretative rather than categorical because of data limitations and an inability to fully understand the context in which requests were received and responded to. Price was able to mitigate these limitations somewhat by conducting interviews with requesters and officials, supplementing his raw data with qualitative analysis. While limitations remain, Price was able to draw meaningful conclusions on how the Act appears to be operating on the basis of his 'snapshot' data.

We have been influenced by Price's general approach. We have a similar aim of seeking an indicative snapshot of the Act's performance, although the subject matter of our request is more narrowly targeted. First, we are interested in *ministerial* compliance with the Act. Price did not request information from Ministers or their offices. By targeting our request to Ministers we seek to distinguish between political and administrative functions of government.[52] The Act itself does not draw this distinction, because it is organised conceptually around information in the

50 See, for example, Paul Lagunes and Oscar Pocasangre "Dynamic Transparency: An Audit of Mexico's Freedom of Information Act" (2019) 97 Public Administration 162; Ben Worthy, Peter John and Matia Vannoni "Transparency at the Parish Pump: A Field Experiment to Measure the Effectiveness of Freedom of Information Requests in England" (2017) 27 Journal of Public Administration Research and Theory 485; and Open Society Justice Initiative *Transparency and Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries* (Open Society Justice Initiative, New York 2006).

51 Price, above n 2. For other examples, see Paula Kingi "Official Information Act Māori with Lived Experience of Disability, and Disability Data: A Case Study" (2021) 17 Policy Quarterly 72; and Grace Wong, Ben Youdan and Ron Wong "Misuse of the Official Information Act by the Tobacco Industry in New Zealand" (2010) 19 Tobacco Control 346

52 See Albert Meijer, Paul 't Hart and Ben Worthy "Assessing Government Transparency: An Interpretive Framework" (2018) 50 Administration and Society 501 at 503–504.

most general terms rather than categories (like documents or records) that might be differentiated according to function.[53] By focusing on quintessentially political functions, we are directly implicating notions of democratic accountability and the legitimacy of the constitutional state which may be less acute at a broad-based, administrative level of government. We are also potentially engaging a second, de facto distinction drawn by Price between political and non-political requests under the Act.[54] Price argues that requests in the first category, with the potential for political embarrassment, are often withheld, delayed or otherwise frustrated without good reason. The second category involves requests that are straightforward and politically uninteresting, which are usually met with the information being released. Targeting our request at Ministers may engage the first category on the basis that much ministerial work is inherently political.

Second, we tailored our request to information withheld on the basis of s 18(d) of the Act only. As outlined in section II above, this is because of a particular interest we have in proactive disclosure and its impact on the operation of the Act. This is obviously more targeted than Price's approach. As a result, our standardised request sought to gain as much information as feasible about refusals to supply based on s 18(d) grounds. In the absence of interviews or other qualitative research methods, we specifically targeted a number of questions at contextual information concerning particular refusals. The aim here was to reveal any factual information that might explain or excuse apparent non-compliance with the Act not otherwise revealed in the empirical data.

The requests were sent in the form of an email, containing 10 questions about the frequency of requests, refusals under s 18(d) and broader information about s 18(d) refusals. We targeted our request to a three-month period between 1 April 2021 and 30 June 2021. This timeframe was in many respects arbitrary, and so was intended to result in a random sample. A three-month period was selected because we wanted the request to cover a sufficiently large range of requests, but without burdening officials with the need for excessive research and data collation. The intention was also for the window to be relatively recent, so that information could be easily found and provided.

The first set of questions requested the number of official information requests and s 18(d) refusals that the Minister received and issued within the three month

53 Kenneth Keith "The Official Information Act 1982" in Robert Gregory (ed) *The Official Information Act: A Beginning* (New Zealand Institute of Public administration, Wellington, 1984) 36. See also *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 402; and *Commissioner of Police v Ombudsman* [1985] 1 NZLR 578 (HC) at 586.

54 Steven Price "The Official Information Act: Does it Work?" [2006] NZLJ 276.

period. We also requested information on how many requests each portfolio received.

The next part of the request concerned the general approach towards issuing refusals under s 18(d). We requested information on whether there was a general practice towards s 18(d) refusals. The nature of any specific advice or exceptional circumstances present in relation to the s 18(d) refusal was also requested. The purpose of these questions was to understand the circumstances in which a s 18(d) refusal is issued. A standardised policy with respect to s 18(d) refusals might promote unlawful decisions as a result of the administrative law rule against fettering discretion. However, with s 18 there is no public interest balancing and good policy reasons for thinking about the issues in advance. There is an emerging case that proactive disclosure should be encouraged,[55] and this line of questioning was in part intended to reveal whether a policy of proactive disclosure had been adopted (although we were specifically interested in any interaction of such a policy with the s 18(d) grounds of refusal). Relevant to this inquiry was data on the specific nature of requests refused under s 18(d), as well as the Minister's general practice towards s 18(d). Understanding exceptional or specific circumstances that led to s 18(d) will better explain the frequency of its usage and may also contribute to an evaluation of s 18(d)'s appropriate application.

The final section of our standardised request concerned the actual public release of information following a s 18(d) refusal. Data was requested concerning the number of times the information was subsequently publicly released. Data was also requested on the time that elapsed between the s 18(d) refusal and the public release. This information was requested in order to measure Ministers' practice of s 18(d) against the Ombudsman's guidelines for public release. Where the public release was later than eight weeks after the refusal, information was requested about whether there was a general practice, advice, or exceptional circumstances that resulted in a later release. This information was intended to build an analysis of the justifications for late public release. Knowing whether the late releases are justifiable is critical to assessing whether the Act meets the standards for an effective transparency framework.

The text of the request sent to each of the Ministers is set out in an appendix to this article. We concede, as we must, that there are limitations to this approach. No standardised request will be able to perfectly capture the whole picture. As with Price's work, any data is impressionistic only and conclusions can only be interpretative. Nonetheless, we consider that even a limited data set adds context and empirical rigour to anecdotal claims about the Act's performance. We simply

55 White, above n 32, at 93.

caution that our results are a starting point for further discussion and debate, rather than offering conclusions to that debate.

Finally, we note that our approach, like Price's before us, allows for an incidental examination of the "transparency of transparency".[56] By this we mean that compliance or non-compliance with our standardised request itself provides evidence of how seriously obligations under the Act are taken. This is an under-developed area of study in New Zealand and internationally and was not a point of emphasis in Price's study.

IV. Results and Analysis: Responses Received

In this section, we set out the responses received to our standardised request and provide some interpretative analysis on what those responses, taken together, mean for ministerial compliance with the Official Information Act. As we have already cautioned, the data and information gained through our survey is impressionistic and so any conclusions can only be tentative. We set out here much of the empirical data in quantitative form, although we also provide context and impressions to assist with the understanding of the data.

Our standardised request was sent to each ministerial office at the Minister's official ministerial email address on the 29 November 2021.[57] Under the Act, the initial timeframe for a response or notification of an extension is "as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received".[58] Due to the definition of working days in the Act and the summer shut down period, this initial deadline for a response or extension fell on 17 January 2022.[59]

A. General Observations

Two ministerial offices requested more information about the specific nature of the request before the 17 January deadline. We responded to these inquiries by explaining that the request for information was directed towards the general functioning of s 18(d) of the Act, and that a general explanation of the approach to

56 See Jean-Patrick Villeneuve "Transparency of Transparency: The Pro-active Disclosure of the Rules Governing Access to Information as a Gauge of Organisational Cultural Transformation" (2014) 31 Government Information Quarterly 556.

57 These email addresses take the form firstinitial.lastname@ministers.govt.nz.

58 Section 15(1).

59 Section 2(1).

using s 18(d) would be useful in the absence of specific explanations of the advice received and rationale for every refusal.

Most ministerial offices responded to the request by addressing each portfolio in the same letter. However, four Ministers responded to different portfolios in separate letters. This suggests that in some ministerial offices at least, requests for information are addressed by separate staff on a portfolio basis without central coordination.

On occasion, we noticed that responses from different ministerial offices employed identical wording (with only quantitative data being different in each case). This suggests that the same person may have drafted the response in each case, or at least that there was a high degree of coordination among the offices of different Ministers.

B. Non-responses

Two ministerial offices failed to provide any substantive response by the time of writing. Particularly concerning to us is that one of these ministerial offices provided no response at all.

A failure to respond to a request for information is a breach of the requirements of the Act. Even if the Minister refuses to supply the requested information, he or she must make a decision on whether and how the information will be provided and give notice of that decision.[60] As noted above, the maximum statutory timeframe for these compulsory steps to be taken is within 20 working days. In the case of an extension, a new timeframe for responding to the request must be notified and, of course, complied with.[61] Meeting these requirements are the bare minimum that would be expected if a culture of compliance with the Act had been adopted among ministerial staff. Further, failure to meet these requirements constitutes breach of a legal obligation.

It is therefore concerning that one ministerial office did not respond to our request at all. Nor did that office respond to a followup email that was sent some 50 working days after the initial request. This non-response was from the office of an experienced, front bench Minister who we anticipate should be familiar with the requirements of the Act. A second ministerial office notified us of an extension to the initial 20 working day timeframe, but then failed to respond any further. While the reasons for non-compliance in each case are not apparent on the information that we have, it is difficult for us to imagine how this lapse could be justified or excused.

60 Section 15(1).
61 Section 15A(4).

These basic failures of compliance in this case suggest that the intent and purpose of the Act has not effectively embedded itself politically in all circumstances.

C. Timeliness of Responses and Extensions

In respect of timeliness of responses to our standardised request, there was some variability. This is concerning in some cases because, again, meeting the timeframes mandated under the Act is a legal requirement and not a matter for political judgement or discretion.

Seventeen ministerial offices provided substantive responses within the 20 working day maximum timeframe without an extension.

Seven ministerial offices notified us that they would require an extension in order to answer the request fully. In one instance, the ministerial office notified us of an extension of three months. The reason given was that this additional time was necessary in order to fully collate all the information. A substantive response was eventually received on 18 February 2022, one month after the extension was notified. In another instance, a Minister twice notified us of the need for an extension. In respect of the second extension, the Minister's office failed to nominate a specific date by which the request would be addressed. This is a breach of the Act, which requires that the period of any extension be specified.[62] A response was eventually received by 16 February 2022. Another Minister notified us of an extension on 17 January 2022 but failed to meet the nominated extension deadline of February 2022. As of 1 March 2022, no substantive response had been received.

The variance in approaches to extensions may be explained by different organisational practices within ministerial offices or different volumes of information to deal with in order for the request to be fulfilled. It is positive that at least one Minister notified an extended timeframe in order to fully collate the requested information. This is an exercise of political judgment in favour of the purposes of the Act being met. There is always the possibility that such a request would be refused on the basis of the need for substantial collation (as some Ministers did),[63] or be made subject to a charge.[64] That said, our expectation is that if the Act is working well then the basic legal requirements around timeframes and extensions should be observed as a matter of course. While in many cases of extensions ministerial offices seemed to be motivated by a desire to provide as much requested information as

62 Section 15A(4)(a).
63 Section 18(f).
64 Section 18A(1)(a).

possible, the minimal legal requirements in the Act should be complied with. There is more work to do to operationalise the Act at the political level.

D. Quantitative Information on s 18(d) Refusals

Our request for quantitative information regarding s18(d) refusals was generally responded to by ministerial offices in comprehensive terms. Information about the number of requests for official information that were received during the specified three-month period was provided by every Minister who responded.

Information about the number of refusals to meet those requests under s 18(d) was provided by all of the Ministers who responded except in two instances. This included information on requests received and s 18(d) refusals broken down by ministerial portfolio. In respect of the two exceptions, one ministerial office refused to provide the information on the grounds that this information was not centrally recorded. Another ministerial office noted that collation of the information would require significant time and resource but did provide the option of providing the information at a later stage. A substantive response was ultimately received from the Minister's office on 16 February 2022, to the effect that the information could not be provided without substantive collation.

Table 1 sets out the proportion of refusals to supply requested information under s 18(d) as a proportion of total requests received during the relevant three-month time period. Where possible the data has been broken down by individual portfolio. It is notable that some Ministers relied on s 18(d) to withhold requested information in respect of a large proportion of requests. Jan Tinetti (in her capacity as Minister for Education) refused to release information on s 18(d) grounds 83 per cent percent of the time.

Table 1: The Proportion of Refusals to Requests Varies across Portfolios

Minister	Portfolio	Requests	18(d) Refusals	Percentage
Andrew Little		No response	No response	
Aupito William Sio	Pacific Peoples	2	0	0 per cent
	Courts	4	1	25 per cent
	Education	5	2	40 per cent
	Justice	2	0	0 per cent
	Non-Specific	2	0	0 per cent
Ayesha Verrall	All	1	0	0 per cent
	Conservation (Acting)	18	0	0 per cent
	Food Safety	2	0	0 per cent
	Health	8	0	0 per cent
	Non-Specific	3	0	0 per cent
Carmel Sepuloni	Social Development and Employment	40	16	40 per cent
	Disability Issues	0	0	0 per cent
	ACC	5	1	20 per cent
	Arts, Culture and Heritage	3	0	0 per cent
Chris Hipkins	Public Service	12	2	17 per cent
	Covid-19 (Health)	28	8	29 per cent
	Covid 19 (Managed Isolation)	17	4	23 per cent
	Education	53	22	42 per cent
Damien O'Connor	Agriculture	15	4	27 per cent
	Biosecurity	3	0	0 per cent
	Land Information	14	2	14 per cent
	Trade and Export Growth	17	1	6 per cent
	Minister of the Crown	2	0	0 per cent
	Combined	3	0	0 per cent
David Clark		No Response	No Response	
David Parker	Revenue	21	4	19 per cent
	Environment	24	6	25 per cent
	Associate Finance	9	1	11 per cent
	Oceans and Fisheries	14	1	7 per cent
	Attorney General	8	0	0 per cent

Minister	Portfolio	Requests	18(d) Refusals	Percentage
Grant Robertson	Finance	61	24	39 per cent
	Racing	0	0	0 per cent
Jacinda Ardern	Prime Minister	44	15	34 per cent
	Child Poverty	3	2	66 per cent
	National Security	4	0	0 per cent
James Shaw	Climate Change	30	19	63 per cent
	Biodiversity	1	0	0 per cent
Jan Tinetti	Education	12	10	83 per cent
	Internal Affairs	32	9	28 per cent
	Women	10	6	60 per cent
Kelvin Davis	Children	3	0	0 per cent
	Corrections	14	2	14 per cent
	Associate Education	3	2	66 per cent
	Māori-Crown relations	3	0	0 per cent
Kiri Allan	Associate Environment	1	0	0 per cent
Kris Faafoi	Broadcasting	22	1	4 per cent
	Immigration	24	8	33 per cent
	Justice	48	8	16 per cent
Marama Davidson	Associate Housing	5	0	0 per cent
	Prevention of family and sexual violence	4	1	25 per cent
	Combined	2	0	0 per cent
	Unspecified (not listed in portfolio breakdown but recorded under question 1).	7	0	0 per cent
Megan Woods	Associate Finance	4	0	0 per cent
	Energy and Resources	20	3	15 per cent
	Housing	50	2	4 per cent
	Research Science and Innovation	5	0	0 per cent
Meka Whaitiri	Agriculture	3	1	33 per cent
	Veterans	2	0	0 per cent
Michael Wood	Transport	62	28	45 per cent
	Workplace Relations and Safety	11	3	27 per cent
Nanaia Mahuta	Foreign Affairs	31	1	3 per cent
	Local Government	20	5	25 per cent
	Maori Development	1	0	0 per cent

Minister	Portfolio	Requests	18(d) Refusals	Percentage
Peeni Henare	Defence	10	3	30 per cent
	Whanau Ora	7	0	0 per cent
	Associate Health	0	0	0 per cent
	Associate Housing	5	0	0 per cent
	Associate Tourism	0	0	0 per cent
	Combined	10	4	40 per cent
Phil Twyford	Immigration	3	0	0 per cent
	Disarmament and Arms control	4	0	0 per cent
	Trade and Export	0	0	0 per cent
	Environment	2	0	0 per cent
	Non-specific	2	0	0 per cent
Poto Williams	Police	51	Not provided	
	Associate Housing (Public Housing)	30	Not provided	
	Building and Construction	21	Not provided	
Priyanca Radhakrishnan	Social Development	3	1	33 per cent
	Community	6	0	0 per cent
	Diversity	9	2	22 per cent
	Youth	1	1	100 per cent
	Non-specific	3	0	0 per cent
Stuart Nash	Forestry	5	1	20 per cent
	Economic Development	25	Not provided	
	Regional economic development	12	Not provided	
	Tourism	33	Not provided	
	Small business	0	Not provided	
Willie Jackson	Māori Development	10	0	0 per cent
	Associate justice	1	0	0 per cent
	Associate ACC	1	0	0 per cent

Prime Minister Jacinda Ardern (in her capacity as Minister for Child Poverty) and Kelvin Davis (in his capacity as Associate Minister for Education) each refused to release information on s 18(d) grounds 66 per cent of the time (albeit on very low raw numbers). Overall, it appears that s 18(d) is used regularly to withhold requested information. Where the data is available, all but three Ministers had used it at least once, and in respect of 10 portfolios s 18(d) had been used to withhold information at least 40 per cent of the time.

E. Request regarding general approach to section 18(d) refusals

In respect of our request for information regarding whether Ministers adopted a standard approach to withholding information in accordance with s 18(d) of the Act, there were three broad categories of responses. The exception was one Minister who did not respond substantively on the grounds that the Minister's portfolios had been delegated during the relevant period.

Twelve ministerial offices clearly stated there was no general practice towards the use of s 18(d) as grounds for refusal. Three ministerial offices responded that there is in fact a general practice. The remaining 10 ministerial offices did not explicitly state that there was a general practice, but nevertheless provided a summary of their approach towards s 18(d) refusals.

Although the responses vary as to whether there is a general practice or not, most Ministers gave similar information on the approach to s 18(d) refusals. Thirteen ministerial offices expressed that requests are considered on a "case-by-case" basis, and six Ministerial offices asserted that requests are considered on their own merits. Depending on the Minister's interpretation, this was either evidence for or against a "general practice".

Ten ministerial offices also responded that the decisions are made in line with advice and guidance from the Ombudsman's office. Many of these responses included a link to the Ombudsman's advice that is available online. Four Ministers also expressed that preparing a response to each request begins with receiving information about whether the information requested is already publicly available or is soon to be publicly released. Several Ministerial offices responded to this question by discussing the proactive release programme that their office conducts. One Minister referred to proactive release as being the "general practice" to releasing information, whereas another Minister did not discuss any general practice but instead discussed their dedication to openness and transparency. Another Minister

also did not respond to the general practice prompt, and instead outlined the process of regularly proactively releasing Cabinet documents.

These responses suggest that Ministers are generally alive to the expectations and issues related to proactive disclosure of information and its interaction with the Act. The emphasis from some ministerial offices that each request is considered separately perhaps indicates a concern not to unlawfully breach the administrative law rule against fettering discretion,[65] but may also indicate a lack of understanding that the rule against fettering does not prohibit the adoption of a general policy.[66] At a rhetorical level at least, most Ministers and their officials laudably seem to locate proactive disclosure within a general impetus to make official information available.

F. Responses about Specific Advice Received in Relation to Refusals

Two of our requests for information were directed at specific advice received in relation to withholding information under s 18(d). The first asked if specific advice had been received (and if so the nature of that advice), while the second asked if any exceptional circumstances relating to the release of the requested information had been identified.

Six ministerial offices gave information on the actual content of the advice they relied on when withholding under s 18(d). Generally, it appears that Ministers do not rely on legal or other outside advice. Instead, advice was related to factual inquiries regarding the publicly available nature of the information. Six further ministerial offices answered that the advice received went to the nature of whether the information was already publicly available, or was soon to be made publicly available, but did not provide detail as to what advice was sought or provided. If we take these comments at face value, it is likely that these were once again factual inquiries. Two ministerial offices stated that no specific advice was received. Five ministerial offices did not respond because there were no s 18(d) refusals in the time period. Finally, two Ministers did not address these questions at all in their responses.

In respect of information regarding any exceptional circumstances relating to s 18(d) refusals, responses were mixed. Only two ministerial offices gave information on exceptional circumstances. One ministerial office responded that exceptional circumstances included information that required Cabinet processes to be completed before it could be released. One ministerial office gave some

65 *M and R v S* [2003] NZAR 705 (HC); and *Practical Shooting Institute (NZ) Inc v Commissioner of Police* [1992] 1 NZLR 709 (HC).

66 *Westhaven Shellfish Ltd v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at 173.

information in respect of one portfolio on the circumstances of the information that was requested. This response included whether the information was already publicly available, as well as the title of the document that was soon to be publicly available. However, a description of exceptional circumstances was not given. One ministerial office responded in general terms that requests are considered on their merits, and officials provide advice as needed on issues related to the Act. One ministerial office did not respond to this question, nor did they give a specific refusal. Six ministerial offices did not respond because they issued no s 18(d) refusals. The majority of ministerial offices did not discuss any exceptional circumstances. Twelve ministerial offices responded that there were no exceptional circumstances.

Six ministerial offices refused to answer this question, although the grounds for refusal varied. Three ministerial offices refused to answer on the basis that the requested information is not held by the ministerial office.[67] One ministerial office refused to supply the information in respect of one portfolio on the basis that the requested information required substantial collation.[68] Another ministerial office refused to supply the requested information because identifying this information would require going through each request individually, which would require a significant amount of time and resource.[69] The Prime Minister's office refused to provide the information on the basis that the information does not exist.[70]

The reliance on various and inconsistent grounds for refusing to supply the requested information is revealing. Our interpretation of the data is that the fact that some ministerial offices refused on the basis of resource constraints while others did not is unlikely be explained with reference to different volumes of information needed to process our request. Rather, it speaks to different practices within separate ministerial offices. We note that ministerial offices have obligations under the Public Records Act 2005 to create and maintain records of their affairs, and to ensure that those records are accessible.[71] The extent of this obligation is not completely clear. It only applies in respect of records that would be kept as part of "normal, prudent business practice" for that office.[72] We read this obligation in an objective sense, so that the standard is "normal, prudent business practice" for that kind of office. A historical failure to maintain records by a particular office-holder does not mean that it is "normal" for that office-holder to not create and maintain such records. If that reading is correct, then the variation in practice among ministerial offices is concerning. We further recognise that "normal

67 Official Information Act 1982, s 18(g).
68 Section 18(f).
69 The Minister received 75 requests in the relevant period.
70 Official Information Act 1982, s 18(e).
71 Public Records Act 2005, s 17.
72 Section 17(1).

prudent business practice" cannot reasonably require that ministerial offices retain every record created. Indeed, it is arguable whether the obligation extends to recording all reasons for s 18(d) refusals under the Act. Nonetheless, it is the general inconsistency in record-keeping in respect of recent decisions is concerning in our view. While some ministers have kept records of all s 18(d) refusals covered by our request, others have not. This suggests that there is no shared understanding of the Public Record Act obligations among ministerial offices, which leads to undesirable variability in being able to hold ministers to account of their treatment of official information. In our view, a stronger obligation applied with greater consistency is warranted. However, this point is not central to our inquiry and needs to be examined further on another occasion.

Further, there may be some ambiguity around whether requests for information, and the way that those requests are dealt with, form part of the core functions of a ministerial office. An alternative view would be that compliance with the Act is an administrative task that does not need to be recorded in the same way. There is little guidance on this point. However, it would be concerning from the perspective of a culture of availability of information if requests under the Act were treated as administrative tasks incidental to (but not comprising) an aspect of the office's core function. There may be resourcing and other practical constraints to consider as well.

G. Timely Release under Section 18(d)

Our final set of questions related to whether information withheld under s 18(d) was in fact subsequently made publicly available in accordance with the Ombudsman's guidance of eight weeks. Where the Ombudsman's guidance had not been complied with, we sought contextualising information to explain the non-compliance.

Six ministerial offices responded that all the information requested was either already publicly available or was released within eight weeks. Six ministerial offices responded that some of the information requested was released outside of eight weeks, whereas some was released within eight weeks. In these cases, the number of releases that were made outside of eight weeks was generally small (one or two instances at most). One ministerial office did not give clear information on when some information requested had been released. Instead, they directed us to a proactive release website to find the information ourselves.[73]

73 Te Tari Taiwhenua The Department of Internal Affairs *Proactive release of titles of Briefings received by the Minister for Digital Economy and Communications, from the Department of Internal Affairs, Jan–Mar 2021* (29 April 2021) <www.dia.govt.nz>.

Of significant concern from a compliance perspective is that four ministerial offices confirmed that the information withheld under s 18(d) still had not been made publicly available some eight months later. Of these, three ministerial offices stated that information for a request is still in the process of being made publicly available. One of these same ministerial offices also stated that the information requested was still in the process of being "proactively released". We suggest that this is particularly troubling. We acknowledge the possibility that, at the time of the request, there was a genuine view that the information would soon be publicly available, with the release taking much longer in reality. Nevertheless, it is difficult to understand how information can be considered to have been soon to be publicly available at the time of request when it still has not been released over six months later. Further, it is difficult to consider that information is being proactively released in any genuine sense when it has still not been released within such an extended timeframe. The Ombudsman's guidance is abundantly clear on this point.

It is also notable that at least one ministerial office drew a distinction between information that is made publicly available and information that is proactively released. There is no such distinction drawn in the Act, and it is conceptually difficult to understand how such a distinction could be meaningful. On our understanding, proactive release refers to making information available before any request for the information has been made. Consequentially, proactive release technically cannot occur where a request for the information has been made. To state that information that has been requested is being "proactively released" suggests a lack of understanding of how the Act operates at a fundamental conceptual level.

Four ministerial offices gave information about the delayed release which can be linked to advice received from officials. One office responded that a publication was delayed because of the latest Covid-19 outbreak. It is perhaps understandable that administrative procedures might be delayed during a global pandemic. One office responded that the releases took longer than eight weeks because of the need to ensure ministerial consideration of the advice. As we outline above, this is manifestly not how s 18(d) is intended to operate.[74] One office responded that the later release was necessary to maintain the constitutional convention which protects the confidentiality of advice tendered by Ministers and officials.[75] It is odd to see refusal to release under s 18(d) coupled with a presumptive reason for withholding under s 9 of the Act. Strictly there is no relationship between the two provisions. It appears that the convention of confidentiality of advice is conceptually distinct from information that is the subject of proactive release. We would not

74 See above section II B.
75 Official Information Act 1982, s 9(2)(f)(iv).

expect confidential advice to be in the process of being made publicly available. Furthermore, it is difficult to see how a delayed release date would change the nature of confidential advice. In the absence of a more comprehensive explanation, this again suggests a lack of understanding about how the Act is intended to operate. The fourth office responded that the release took longer than anticipated due to specific circumstances related to security, defence and international relationships.

Ten ministerial offices refused to supply the requested information, although their stated grounds for doing so again varied between offices. The Prime Minister's office refused to supply the information on the grounds that the requested information did not exist.[76] Three ministerial offices refused to provide the information on the grounds that the requested information is not centrally collated.[77] The remaining six ministerial offices refused to supply the information on the grounds that the requested information was not held by the office.[78] These various and inconsistent reasons for refusing to supply the requested information, where other offices made the equivalent information available, raises the same concerns about the creation and maintenance of public records that we raised earlier.

Three ministerial offices discussed that, although they did not have records available for whether the information had been publicly released, as of July 2021, new processes have been implemented to ensure that information is tracked. The July 2021 start date is immediately after the period that we requested (1 April 2021 – 30 June 2021), so it does not benefit our OIA request. It will be interesting to see how this plays out.

One ministerial office did not respond to this question at all. One ministerial office responded only by stating that the Minister expects the agencies responsible for public release must be reasonably certain the information will be published in the near future. This response gave no indication as to whether the information has in fact been publicly released. Six ministerial offices did not respond because they issued no s 18(d) refusals during the relevant timeframe.

V. Conclusions

This article has sought to inform calls for reform of the Official Information Act by providing an empirical basis to understand ministerial compliance with the Act. We have outlined the conceptual framework, our methodology, and the results of our empirical survey. We sought to understand the real-world impact of s 18(d) of the Act

76 Official Information Act 1982, s 18(e).
77 Section 18(f).
78 Section 18(g).

in particular, given the modern emphasis on proactive disclosure and the potential for the balance of political convenience to delay release of requested information.

We have emphasised throughout that it is very difficult to draw definitive conclusions because of the narrow focus of our survey and the difficulty in understanding the full context. Nevertheless, we consider that our results are informative. While it is reassuring that basic failures of legal compliance, such as responding to information requests within statutory timeframes, are rare, it is concerning that they should occur at the ministerial level at all. Further, there are clear inconsistencies in administrative practice among different ministerial offices. Finally, there is evidence of manifest failures to understand or comply with the Act in circumstances where information may be made publicly available in the future. While these failures do not appear to happen often, they can be serious when they do occur.

Some of these concerns may be explained by the fact that managing information in modern government is difficult and time-consuming. However, we also consider that, while the Act appears to be operating largely as it should in many circumstances, a culture of best practice compliance has not yet developed comprehensively across the highest level of government. Where s 18(d) is used to refuse to supply information on the grounds of expected future public release, it appears political drivers can weigh as heavily as the impetus for compliance. The problem is by no means urgent, based on our survey, but in due course it should be addressed. We hope these insights will prove useful in future debate and discussion about possible reform of the Official Information Act.

Appendix

The following information was requested from each Minister:

1. The number of Official Information Act requests that the Minister received during the three-month period from 1 April 2021 to 30 June 2021.

2. The number of refusals to meet those requests under section 18(d)(including information on whether section 18(d) was the sole ground of refusal or one of several).

3. If the Minister received requests in relation to different portfolios, information on

   (a) the number of requests received in relation to each portfolio, and
   (b) the number of refusals under section 18(d) in relation to each portfolio.

4. Whether the Minister has adopted a general practice towards refusals under section 18(d) and if so a summary of that practice, including whether that general practice is based on advice, and if so a copy of that advice (or where a copy is not available, a summary of the content of that advice).

5. Whether, in respect of each refusal in respect of (2) above, request-specific advice on a section 18(d) refusal was sought and/or received, and if so, a summary of the content of that advice.

6. Whether in respect of each refusal in respect of (2) above, there were any exceptional circumstances the Minister took into account when deciding to refuse release, and if so, what were the nature of those circumstances.

7. Whether, in respect of each refusal in respect of (2) above, the requested information was in fact made publicly available.

8. When the requested information was later made publicly available,

   (a) the number of times that the public release was made within 8 weeks of the refusal (in line with the Ombudsman's guidelines on the proper application of section 18(d)); and
   (a) the number of times the requested information was released more than 8 weeks after the refusal.

9. Whether, in respect of each instance identified in (8)(b), the release taking longer than 8 weeks was based on a general practice that the Minister takes in relation to refusals under section 18(d) (and if so, an explanation of that general practice).

10. Whether, in respect of each instance identified in (8)(b), the fact that release took longer than 8 weeks was based on advice or due to circumstances specific to the information being released (and if so, an explanation of that advice or those circumstances).