Regulating Archival Access in New Zealand:
An Argument for Greater Transparency and Accountability

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Introduction

Archival regulation is an obscure and seldom discussed area of the law. Archival repositories comprise the official memory of nations. They are fundamentally important for the research of professional historians and journalists, and are used by individuals for genealogical research. But the broader social role of the archives is often overlooked – they document of the exercise of power by the state. Further, records do not just document the use of power; they themselves can be the instruments of power. To ensure adherence to the rule of law and fulfill democratic ideals, archives should be open to inspection by the public. In effect, archives fulfill a constitutional role: without preservation and public access to the official record it is impossible for democracy to function properly. Rules governing archival access, therefore, have become an important facet in legal developments for the regulation of official information; an issue that has become ever more complex and sophisticated over the last few decades. The key legal requirements for a good system are transparency and accountability for decision-making in relation to archival access. Yet rules determining archival access are amongst the most difficult areas of archival regulation, and in New Zealand there is obvious room for regulatory improvement to enhance both of these requirements.

There are few secondary sources directly on archive law. Many of the notable publications in New Zealand on information, research, and constitutional law pay little or no attention to the law surrounding archives.[1] Indeed, there is a deficit of legal writing on archives internationally. The only sophisticated legal texts on archive law have come out of the United States of America, published by the Society of American Archivists. *Archives and Manuscripts: Law,* by Gary M. Peterson and Trudy Huskamp Peterson was published in 1985 as part of the Society's Basic Manual Series.[2] Directed primarily at assisting archivists understand the complexities of

[1] Notable texts in the area of official information law in New Zealand include Ian Eagles, Michael Taggart, And Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992); G. D. S. Taylor and P. A. Roth *Access to Information* (LexisNexis, Wellington, 2011). For a constitutional assessment of official information laws (neglecting archive law) see Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (Thompson Brookers, Wellington, 2007).
[2] Gary M. Peterson and Trudy Huskamp Peterson *Archives and Manuscripts: Law* (Society of American Archivists, Chicago, 1985).

American Federal and State laws governing archives, the book was an essential resource for American archivists and researchers, and demonstrated many of the problem areas common to the regulation of archival access internationally. More recently the Society released another publication: *Navigating Legal Issues in Archives* by Menzi L. Behrnd-Klodt.[3] This work elucidates all the legal issues facing archivists, researchers, and their respective legal representatives under the law of the USA. As such it offers a comprehensive guide to legal issues that may arise in relation to archival access, though its specific focus on American law means its applicability to New Zealand is limited.

This dissertation aims to fill a gap in the legal literature on official information in New Zealand. As a History student, it became apparent to me in talking to historians that researchers in New Zealand are ignorant of the operation of the law in this area, but so are legal academics, and in some circumstances, government departments and even archivists. This work represents the first examination of the operation of the law governing archival access in New Zealand and the principle legal issues involved. In doing so, it concludes there are weaknesses in current regulation, and suggests solutions to improve transparency and accountability for access decisions. The lack of research and writing in the area means that this dissertation does not fit into any existing disputes in New Zealand. I have had to 'beat my own path' on the topic to determine the salient legal issues surrounding archival access. I did, however, gain important insights into this area of regulation from a series of interviews I conducted with senior members of the archival community in New Zealand.[4]

Guides written by international organizations give insight into international trends in archival regulation, and suggest mounting desire for greater transparency and accountability. In 1999 the International Records management trust published "A

[3] Menzi L. Behrnd-Klodt *Navigating Legal Issues in Archives* (Society of American Archivists, Chicago, 2008).
[4] For these insights I am particularly indebted to Stuart Strachan (member of the Archives Council), John Roberts (Director, Client Capability at Archives New Zealand), and Greg Goulding (Chief Archivist and General Manager of Archives New Zealand).

Model Records and Archives Law".[5] This work not only gives a useful model law for archival and records management, demonstrating the fundamental concerns about regulation, but also provides a useful introduction and clearly articulates the central guiding principles pertaining to archive law in modern democratic society. In addition, the International Council on Archives adopted useful "Principles of Access to Archives" in 2012. Finally, the International Standardization Organization has drafted some of its own model regulations to aid in policy and legislative drafting of archival law.[6] The latter are of limited use, but do give insight into international trends for greater consistency in archival regulation on an international level.

In contrast to a lack of legal writing, there is an abundance of general historical, political, philosophical, and archival literature on the purpose and nature of archives, archivists, and the importance of public access. This information has been very informative, elaborating on the interests at stake, and highlighting the development of the principles of transparency and accountability. Ernst Posner's 1967 *Archives and The Public Interest* provides an important starting point which lucidly states the interests at stake and the role of the archives in modern society.[7] For a clear and concise rundown of the historical development of archives, Michel Duchein gives an excellent and unparalleled account.[8] Many of my ideas on the role of archival regulation were usefully informed by relatively recent discussions on this topic by archivists Chris Hurley and Eric Ketelaar.[9] Gripping examples of the social abuses which archives have facilitated or in which they have otherwise played some role, are usefully documented in the excellent collection of essays *Archives and the Public*

[5] International Records Management Trust *A Model Records and Archives Law* Michael Roper (ed) (International Records Management Trust, London, 1999).
[6] International Organization for Standardization "International Standard on Records Management" ISO 15489 (October 2001); International Organization for Standardization "Records Management Part 2: Guidelines" ISO/TR 15489-2 (October 2001).
[7] Ernst Posner *Archives and The Public Interest: Selected Essays* (Public Affairs Press, Washington, 1967.
[8] Michel Duchein, "The History of European Archives and the Development of the Archival Profession in Europe" (1992) 55(1) The American Archivist 14-25.
[9] Chris Hurley "The Evolving Role of Government Archives in Democratic Societies" (plenary address to the Association of Canadian Archivists Annual Conference, Winnipeg, 9 June 2001); Eric Ketelaar "Archival Temples, Archival Prisons: Modes of Power and Protection" (2002) 2(3) Archival Science 221-238.

Good.[10] Finally, I gleaned insight into much useful contemporary debate from the Journal of the Archives and Records Association of New Zealand, *Archifacts*.

Because of the lack of relevant secondary legal sources, my research relies primarily on primary sources. The research and conclusions rely heavily on interpretation of the primary statutes governing archival access in New Zealand: the Archives Act (the old law), the Public Records Act, Official Information Act, and the Privacy Act. It also relies on the guides and regulations that have been issued under the Public Records Act by the Chief Archivist. Official reports and decisions have been very useful, especially the report of the Law Commission on the operation and implementation of the Official Information Act, *The Public's Right to Know*,[11] and reports and decisions of the Ombudsman under the office's Official Information complaints jurisdiction. For the purpose of drawing comparisons, contrasts, and formulating suggestions, I have also relied on a substantial body of law from other jurisdictions. Relevant law is taken primarily from Australia, Canada, and the United Kingdom, as the problems these jurisdictions face in the area of archival access are essentially very similar, though each approaches the various problems in different ways.

There has been much written on the operation and regulation of archives at a local, regional, or state level, but this work is concerned only with national regulation applying to central government. The processes for retention and access to such records, although generally mandated by the Public Records Act and Local Government Official Information and Meetings Act, differ substantially between various local authorities in New Zealand, and are not in fact regulated sufficiently to allow any useful overall assessment. Furthermore, the different systems in place in various states within nations operating under federal systems of government, including Australia, the USA and Canada, are far too disparate for any useful comparative analysis to be undertaken.

The first chapter introduces the development of archival regulation as constitutionally significant in democratic society and the important position the principle of public

[10] Richard J. Cox and David A. Wallace (eds) *Archives and the Public Good: Accountability and Records in Modern Society* (Quorum Books, Westport CT, 2002).
[11] Law Commission *The Public's Right to Know* (NZLC R125, 2012).

access to archives has acquired, and the development of the related principles to ensure transparency and accountability in decision-making. The second chapter assesses the current New Zealand regulation of the disposal of public records – records must be kept in the first instance if they are to be accessible as archives. This part of current legal regulation of the archives is particularly strong and satisfactory. The third chapter explores the regulation of access, and the means by which restrictions may be imposed on archival material. Here there is substantial room for improvement as current regulation lacks adequate rules to facilitate these decisions. The fourth chapter examines the current procedures for review of decisions to restrict access to archival material. Here too there is substantial room for improvement, and comparable jurisdictions provide efficient and desirable alternatives in the form of special review authorities.

Regulating access to archival material is never easy. This area of law contains classic conflicting principles – public interests in access must be weighed against countervailing public interests in withholding, and striking a balance not straightforward. While New Zealand has attempted to grapple with these difficulties through the passage of the Public Records Act in 2005, there remains significant room for improvement. While solutions to problems in the current regulatory regime may not require a major overhaul of the legislation, they will require a return to the first principles upon which archival access is predicated. Through clear articulation by a central authority of the rules to be applied when restricting access, and the establishment of a new review mechanism, the current process will I argue, be improved both in efficiency and perceived legitimacy, ensuring both transparency and accountability.

Chapter 1: The Role of Archives in Democratic Society

Archives play an important, often overlooked, constitutional role in modern democratic society. They provide a fundamental resource for historians and policy-makers who want to determine the events and policy precedents of the past. In effect, public archives ensure government accountability over the long term. They facilitate the democratic process, and maintain our cultural heritage and memory. Just as precedents are set in the law, society sets precedents for future conduct. Without access to the information contained in archives we are doomed to repeat past mistakes or injustices. Thus archives can be described as fulfilling a 'constitutional-heritage' role which society values.[1] At the same time some types of information are considered to deserve a degree of protection and/or confidentiality that provide countervailing considerations to the principle of public access. The protection of privacy, copyright, commercial interests, and national security might all be considered reasons to deny public access.

Public access to archives is not an ancient right. It is, in fact, a very modern notion, and thus society is still coming to grips with how to adequately regulate archives to ensure an adequate balance between confidentiality and accessibility. New Zealand came late to regulating archives, only enacting legislation in 1957. In 2005 it enacted new legislation to update archival regulation, improve compatibility with other constitutionally-significant freedom of information legislation, and to ensure greater protection to the public right of access. The new legislation therefore represents a significant contribution to New Zealand's constitutional framework in the area of information management.

Archiving is an ancient practice, but legal regulation of archives and the principle of public access derive from the late 18th century. Archival repositories were maintained in ancient Greece and Imperial Rome, but these archives were maintained for the interests of the political elite.[2] From this time archiving developed as specialist

[1] Julienne Molineaux "New Zealand's National Archives: An Analysis of Machinery of Government Reform and Resistance, 1994-1999" (Doctor of Philosophy in Political Studies, University of Auckland, 2009) at 3.
[2] See generally Ernst Posner *Archives in the Ancient World* (Harvard University Press, Cambridge Massachusetts, 1972).

discipline concerned primarily with the serialization, preservation, and translation of official and legal documents. Throughout European history, official archives were either fully closed to the public, or open only to privileged researchers (and then primarily only for official purposes). The *legal right* of public access to archives was first enacted in the wake of the democratic upheaval of the French revolution and ensuing Napoleonic conquests. These events caused great disruption to administrative and legal structures throughout continental Europe. The revolutionary French law of 7 Messidor Year II (25 June 1794) declared, for the first time in history, that citizens had a right to access public archives.[3] Following this, the concept that archival research was a civil right, and consequent legal protection of this right, spread throughout Europe. [4]

History suggests that the rights of archivists, public offices, and the public at large will always depend on the type of society in which they exist. Archivist Chris Hurley has pointed out that the primary functions of archivists – to ensure records are ordered, authentic, and protected – are ethically neutral.[5] He further points out that totalitarian or oppressive regimes often tend to be far more adept at record keeping, and need good records just as much as any other society.[6] In democratic societies archival practice and regulation are informed by democratic values. The 19th century and the industrial revolution brought with it the radical democratization of many Western states. The expansion of the franchise coupled with the publication of more sophisticated democratic theories, created mounting support for government accountability. Alongside this process, there were growing concerns over national identity and heritage, vital to the process of nation-building which continued into the 20th century. Public access is therefore a specific product of the democratic tradition: a constitutional principle to facilitate the democratic process and inform the development of the nation state.

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[3] Messidor Year II (25 June 1794) (France) Art 1 and Art XXXVII.
[4] Michel Duchein "The History of European Archives and the Development of the Archival Profession in Europe" (1992) 55(1) The American Archivist 14 at 17.
[5] Chris Hurley "The Evolving Role of Government Archives in Democratic Societies" (plenary address to the Association of Canadian Archivists Annual Conference, Winnipeg, 9 June 2001) at 1.
[6] At 1.

It was not until after the World Wars that public access to archives became more uniform throughout the democratic world. While public access to official information held in archives developed very early in some countries, such as France, the modern concern with freedom of information (FOI) law dates from the mid 20th century, owing much to the excesses of totalitarian regimes and colonialism. The West recognized that records could be significant instruments for oppression – especially evident in the Nazi use of IBM sorters, tabulators and printers in most concentration camps.[7] Totalitarian regimes routinely used record keeping measures as tools for power, torture, murder, and surveillance. Records were destroyed to conceal war crimes or crimes against humanity when the regime was imperiled. Both in Nazi Germany and in Stalin's USSR, records were altered to ensure the continuing legitimacy of the regime.[8] In the words of Jacques Derrida "there is no political power without control of the archives, if not of memory. Effective democratization can always be measured by this essential criterion: participation in and the access to the archive, its constitution, and its interpretation."[9] Eric Ketelaar points out "the archives' power is (or should be) the citizen's power too."[10] These concepts sparked the enactment of archival and more general FOI legislation throughout the world in the post-war era which prioritized public access.

The modern conception of the role and importance of archives in a democratic society put succinctly by the International Records Management Trust and International Council of Archives:[11]

> The primary reason for the preservation of records is to serve as evidence for long-term social accountability, that is for their enduring historical and cultural value. Accordingly, records are recognised as a basic component of each nation's heritage, part of its collective memory, a testament to its history and an embodiment of its national identity. A programme for the proper management

[7] Eric Ketelaar "Archival Temples, Archival Prisons: Modes of Power and Protection" (2002) 2(3) Archival Science 221 at 225.
[8] At 226.
[9] Jacques Derrida *Archive Fever*: *A Freudian Impression* (University of Chicago Press, London, 1996) at 2, fn 1.
[10] Ketelaar, above n 7, at 221.
[11] International Records Management Trust *A Model Records and Archives Law* Michael Roper (ed) (International Records Management Trust, London, 1999) at 3.

> of archives – maintaining their integrity, guaranteeing their safety and thereby providing state, society and citizens with an historical perspective – is the duty of a civilised state.

National legislation in most Western countries today establishes and regulates the role of archival authorities and institutions. They are charged with certain responsibilities in regard to the maintenance, identification, and disposal of records generated in the public sector, both paper and electronic. Archival legislation generally provides for public access to archives after a specified period.[12] The access status of archival records tends to be assessed on the basis of a series of records, rather than individual items, because of the various resource constraints of governments and archival authorities.[13] In most jurisdictions archival legislation (and associated legislation such as FOI, Privacy, Census, and Statistics legislation), contains specific limited or permanent exemptions for certain classes of records.[14] Such limitations or exemptions to the general presumption of public access are based on modern notions of what constitute reasonable limitations on freedom of information, such as personal privacy or national security. A further common feature is an appeal or review procedure. Private citizens should be able to apply for a review of restriction decisions because it is often the case that classes of records contain within them documents which individually are not justifiably restricted.

New Zealand was surprisingly late to officially regulate archives.[15] In 1957 the Archives Act was passed establishing the National Archives and the appointment of a Chief Archivist.[16] Prior to the passage of this act archiving had been informal and ad-

[12] Most often after 25, 30, 50, 75, or 100 years dependent on the jurisdiction or category of record. See, for example, the Archives Act 1983 (Cth), Freedom of Information Act 2000 (UK), Code of Access to EU Documents 1993 (EU), Access to Information Act RSC 1985 c A-1.

[13] Sometimes the contrasting situation arises where records are opened to the public when, in fact, they should have been restricted.

[14] Exceptions are normally spelt out in the FOI legislation itself (see legislation listed above at n 12 for examples), but often there is also other significant legislation. In New Zealand the most significant legislation under which information may be withheld are the Privacy Act 1993 and the Official Information Act 1982.

[15] Britain, for example, had regulated archives since the passage of the Public Records Act 1838 (UK) 1 & 2 Vict c 94.

[16] Archives Act 1957, s 6.

hoc, with records considered to have historical significance for New Zealand piling up in the Parliamentary library, or held by the Public Record offices in Britain and New South Wales.[17] The Archives Act provided that records over the age of 25 years should be deposited in the National Archives and that no records should be destroyed without the consent of the Chief Archivist.[18] It imposed of a duty compulsory transfer of many classes of public records to the archival authority to make a decision on disposal of records, and granted the public a right of access to records retained.[19] The primary function of the National Archives under the Archives Act was the collection and preservation of records considered to be of 'permanent value', the destruction of those records determined valueless, and the organization and classification or description of records for reference purposes for the government, scholars, and the general public.[20] The Chief Archivist was appointed as an employee of the Department of Internal Affairs to exercise independent oversight of the disposal of records by those government departments that were covered.[21] He or she could place restrictions on access at the direction of the Minister of Internal Affairs if the documents were considered sensitive.[22]

The Public Records Act updated the regulation of national archives due to a number of factors. Primarily, the 1957 Archives Act was outdated. With the development, expansion, and creation of new government agencies, and the development of new forms of electronic records and transmission, there was an urgent need to clarify which agencies and types of records were covered by the Act.[23] Notable new agencies included the State Owned Enterprises. Records maintained by public schools and the police also created substantial uncertainty. The Public Records Bill was placed before

[17] Pamela Somers Cocks "Plans for a national system" in *An Encyclopaedia of New Zealand* A. H. McLintock (ed) (originally published in 1966) Te Ara - the Encyclopedia of New Zealand (22 April 2009) <http://www.teara.govt.nz/en/1966/archives/page-2>.
[18] Archives Act, ss 10, 15.
[19] Sections 10, 15, 20.
[20] Pamela Somers Cocks "Functions and Scope of National Archives" in *An Encyclopaedia of New Zealand* A. H. McLintock (ed) (originally published in 1966) Te Ara - the Encyclopedia of New Zealand (22 April 2009) <http://www.TeAra.govt.nz/en/1966/archives/page-3>.
[21] There were various departments that were exempt from the provisions of the Archives Act – see s 3.
[22] Archives Act, s 20(a).
[23] (16 September 2004) 620 NZPD 15775 at 15775.

Parliament in 2004 aimed to clear up all these uncertainties. The result was a significant expansion in the government departments subjected to the recordkeeping and disposal standards of the Chief Archivist and the introduction of a broad definition of "public records" to keep apace with technology.[24] While archivists around the country saw an opportunity to push for reforms to gain greater prestige, resources, and independence for their agency, there were also important social and democratic reasons put forward to justify the propriety and necessity of the new legislation.[25]

Since the 1957 Archives Act the Bill of Rights Act was introduced in 1990 which includes "the freedom to seek, receive, and impart information and opinions of any kind in any form."[26] More importantly in 1982 the Official Information Act (OIA) was introduced and the Privacy Act in 1993 which, like the Bill of Rights Act, have quasi-constitutional status. Such legislation signaled a marked constitutional shift towards a more open society, aptly demonstrated by the repeal OIA of the Public Secrets Act 1951, but with new regard for the protection of personal privacy. The constitutional role of the Official Information Act derives from its central function of ensuring governmental transparency and accountability by creating freedom of information requirements for central government and related departments and agencies.[27] Guidance for consistency with the Privacy Act is provided in both The Legislation Advisory Committee's *Guidelines*[28] and the *Cabinet Office Manual.*[29] Both of these quasi-constitutional statutes play a central role in regulating access to records. The introduction of the Public Records Act, therefore, presented an attempt to bring archival regulation into line with Official Information Act principles and to

[24] Compare s 4 of the Public Records Act with s 2 of the Archives.
[25] For a full account of the long and hard fought process of archivists in New Zealand for legislative reform, see generally Molineaux, above n 1.
[26] New Zealand Bill of Rights Act 1993, s 14.
[27] *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 391.
[28] Legislation Advisory Committee *Guidelines on Process & Content of Legislation* "Chapter 15: Privacy and the fair handling of personal information" (2006) <http://justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_15.html#18>.
[29] Department of the Prime Minister and Cabinet *Cabinet Office Manual* (Wellington, 2008) at [7.60], [8.52-8.61].

clearly delineate the role and obligations of government departments and the archival authority in regard to record management.[30]

The Minister responsible for Archives New Zealand at the time of the passage of the Public Records Bill through Parliament, Marian Hobbs, made clear the significance of archives as complementary to the OIA for ensuring the public accountability of government.[31] While OIA is generally perceived as the key legislation for ensuring public scrutiny of government actions, it is certainly also true, and often overlooked, that archives also perform this function, in the longer term. The value of older records for the continuing accountability of government is especially evident in colonial settler societies such as New Zealand, Australia, and Canada where historical records form the basis for indigenous grievances against the government for historical injustices. For example, in New Zealand the Waitangi Tribunal relies heavily on historical archival research in its attempts to settle grievances between Māori and the Crown.[32] Denial of access to such archival records would be tantamount to denying Crown accountability for historical injustices perpetrated against the Māori peoples. To ensure archives fulfill their constitutional purpose, it is fundamentally important that the regulations adequately facilitate an appropriate balance between recognition of the public interest in withholding information and the public interests in releasing information. Information should not be withheld or restricted unless this is clearly justifiable under law, and the process for decision making in this area must be transparent.

The dangers present in a system which fails to allow archival access can have a significant impact on the lives of citizens. A specific example can be seen in complaints about the historical employment treatment of Aboriginal and Torres Straight Islanders which is now generally termed the issue of 'stolen wages'. The practices of withholding, redirecting, and underpaying Aboriginal wages and other entitlements (such as medical benefits) were widespread in Australia until the mid

[30] (16 September 2004) 620 NZPD 15775 at 15775.
[31] At 15775-15776.
[32] The Waitangi Tribunal is a Commission of Inquiry which hears claims by Māori for compensation from the Crown for illegal land seizures and other wrongs dating back to 1840.

twentieth century.[33] Following much agitation by indigenous Australians for governmental recognition of these injustices and the implementation of remedial measures, some Australian state governments have established reparation schemes.[34] Alarmingly, in some instances, especially in Western Australia and Queensland, claimants have been denied access to the relevant archival records by government departments or the archival authorities, effectively barring claims.[35] This example clearly demonstrates the significant impact that archival regulation, through denying access to records, can have on the lives of citizens, and thus the importance of effective legislation to prevent abuse of the system by officials.

This area of the law, as it has developed, contains classic conflicts of interest, which are notoriously difficult to reconcile. The traditional purpose of archives – to preserve records for the benefit of government itself – is still fundamentally important, with governmental agencies constantly borrowing back records they have deposited with the archives.[36] The necessity of availability for interested government departments, and interests such as national security and the maintenance of international relations, constitute valid reasons for withholding information from the public. These more traditional archival concerns of good government recordkeeping tend to be attuned to the role of archivists themselves, who often place priority on the organization and preservation of records. Government interests, coupled with the modern notion of the need for protection of personal privacy, serve as strong countervailing interests to the general presumption of public access. Yet democratic societies, over the last two centuries, have developed a desire to create government accountability and foster the national heritage. The Public Records Act was enacted as a constitutionally significant protection to improve the balancing of these various and conflicting

[33] See generally Rosalind Kidd *Hard Labour, Stolen Wages: National Report on Stolen Wages* (Australians for Native Title and Reconciliation, Report, 2007).
[34] Department of Premier and Cabinet "Aboriginal Trust Fund Repayment Scheme" New South Wales Government <http://www.atfrs.nsw.gov.au/who_is_eligible_to_make_a_claim> ; Human Rights and Equal Opportunity Commission "Submission to the Senate Legal and Constitutional References Committee on the Inquiry into Stolen Wages 2006" <http://www.humanrights.gov.au/inquiry-stolen-wages>.
[35] "Stolen Wages" (2013) Creative Spirits <www.creativespirits.info/Aboriginalculture/economy/stolen-wages#toc1>.
[36] Molineaux, above n 1, at 3.

interests surrounding archival regulation, but so far little has been improved or clarified in the area of access.

Chapter 2: Establishing Archives: Disposal Decisions and the Important Role of the Chief Archivist

The good management and preservation of information are important and necessary prerequisites for access. This requires careful determinations of what should be kept, and what can be safely discarded. The purpose of archival preservation is to create a source for national collective memory, ensuring the preservation of cultural heritage and the accountability of government in the long-term. In order to fulfill this purpose there is a need to define 'records', and then a further need to ensure there are adequate processes in place for their preservation. Good recordkeeping is necessary facilitate the process of appraisal before disposal. The concern is always that disposal decisions are unbiased. The destruction of official information for politically motivated reasons, such as saving a department from public embarrassment or concealing misconduct, is to be avoided. Resource constraints mean that it is impossible for everything to be kept, but so long as an adequately transparent system exists to legitimize disposal decisions, the system will function smoothly.

The Public Records Act (PRA) attempts to meet these concerns through the establishment of the politically neutral office of the Chief Archivist. The Chief Archivist has been given wide-ranging powers of oversight in regard to government record management. The Chief Archivist has also been assigned the fundamentally important task of authorizing the disposal of official records. Examples for the management of archives in South Africa, Queensland, and the United Kingdom (UK) serve to demonstrate how this role can be subject to abuse and allow a framework for comparison of the protections provided by the PRA. The Act provides important safeguards to the integrity of government recordkeeping and checks on disposal decisions to ensure accountability. Limitations persist, and there is some ambiguity generated by the PA. But the current system for disposal generally creates an adequate balance of responsibility to ensure compliance by departments and oversight of by the Chief Archivist providing for both transparency and accountability.

The importance of checks on the disposal of official records, for the maintenance of democracy and the rule of law, is underscored by an example from South Africa. As the National Party's rule in South Africa, in power since 1948, was drawing to a close,

the state conducting a large-scale purge between 1990 and 1994 of official records relating to the apartheid system of state-sanctioned of racial segregation to keep specific information out of the hands of a future democratic government.[1] The ability to do this was a product of various circumstances: the lack of true democratic accountability of the government; improper political influence over the archival authorities; and weak regulation of archival disposal decisions, providing loopholes for agencies to destroy records without proper authorization.[2] Consequently many records were destroyed "legally" because they fell outside the ambit of the Archives Act, the legislation imposing authorization procedures by the archival authority for disposal.[3] The results of this policy were devastating. The destruction of official records in this instance impaired the search for truth into the many excesses of the apartheid regime, covering up an important parts of the nation's history. More specifically it denied public accountability of the former government and its officials. Important protective measures are therefore required in democratic society to prevent the improper destruction of official information. There are also more recent examples of instances where regulation of disposal has been obviously deficient.

An example from Queensland, referred to as the "Heiner Affair," highlights the danger in giving broad discretion to archival authorities for disposal decisions. This was a complex incident in which archival documents pertaining to impending litigation were destroyed by the Queensland archival authority. The "Heiner documents" were records of interviews and other materials collected during an official inquiry into inmate abuse at the John Oxley Youth Centre (JOYC) by retired stipendiary magistrate Noel Heiner – an inquiry that was terminated before completion.[4] The inquiry had been commenced at the request of the Department of Family Services and Aboriginal and Islander Affairs (DFSAIA) and the Queensland

[1] Verne Harris "'They Should Have Destroyed More': The Destruction of Public Records by the South African Government in the Final Years of Apartheid, 1990-1994" in Richard J. Cox and David A. Wallace (eds) *Archives and the Public Good: Accountability and Records in Modern Society* (Quorum Books, Westport CT, 2002) 205 at 205-206.
[2] At 210-219.
[3] At 215.
[4] *The Public Interest Revisited: Report of the Senate Select Committee on Unresolved Whistleblower Cases* (Senate Print, Canberra, 1995) at 51.

State Services Union which had voiced concerns over the management of JOYC.[5] The manager of JOYC, Peter Coyne, who was under investigation and who gave evidence to Noel Heiner during the inquiry, was ultimately removed from office. Early in 1990 he sought access to the Heiner documents through his solicitors and union representative and advised the DFSAIA that he was intending to institute legal proceedings against them. Meanwhile, following his request for access and threat of legal proceedings a Cabinet official sought permission to destroy the records, and the State Archivist authorized destruction within a few hours.[6]

The potential ramifications of the destruction of these documents were significant. The records collected during the investigation pertained to suspected child abuse at JOYC ranging from psychological to criminal physical abuse. The evidence suggested there were many government officials at the time who knew about the abuses, and did nothing. Some of these persons continue to serve in government today.[7] The role of the archival authority in the "Heiner affair," although not central to discussions of the topic, was significant. Important questions exist about the political independence of the archival authority. The Queensland State Archivist enjoyed a very broad discretion to determine which State records were preserved and destroyed under the Libraries and Archives Act 1988. Any attempt to judicially review the decision would therefore have been very difficult, especially as reasons did not have to be given for destruction. The Crown solicitor's opinion in this instance was that the archivist could consider anything she pleased, and that there was no obligation to consider the interests of potential private litigants or complainants – though it is unclear how a court might interpret the discretion.[8] In any even, the rapid decision of the archivist, who took only a couple of hours to appraise the records and authorize their destruction suggests negligence. It was also unclear what level of political independence the Archivist was supposed to have in relation to disposal decisions.[9]

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[5] Chris Hurley "Records and the Public Interest: The 'Heiner Affair' in Queensland, Australia" in Richard J. Cox and David A. Wallace (eds) *Archives and the Public Good: Accountability and Records in Modern Society* (Quorum Books, Westport CT, 2002) 293 at 293.
[6] At 296-297.
[7] Kevin Lindeberg "The Heiner Affair and the Queensland Governor" (Australians for Constitutional Monarchy Annual Conference, Sydney, 27 August 2005).
[8] Hurley, above n 5, at 300-303, 306-307.
[9] At 307-309.

These regulatory ambiguities must be avoided to prevent rushed and harmful decisions.

The impropriety of purposeful destruction or concealment of official documents to prevent "embarrassment" was highlighted in a case from the UK: *Matua v The Foreign and Commonwealth Office*.[10] The case concerned an action for personal damages against the UK Foreign Commonwealth Office for injuries to prisoners suspected of being Mau Mau rebels during the uprising in Kenya between 1954 and 1959.[11] There were serious allegations that British officials in Kenya were aware of various forms of physical mistreatment including torture, castration, and beatings, and failed to do anything about them, and that in some circumstances they may have participated.[12] Part of the documentary evidence relied on by the plaintiffs involved Foreign and Commonwealth Office migrated archives: an incriminating collection of documents from former British colonies that were returned to the UK upon decolonization, some of which had gone missing or been destroyed. Historical researchers had failed to locate some 300 boxes of relevant materials through the relevant authorities, yet close to the beginning of the trial these boxes were, somewhat miraculously, found.[13]

Although not one of the key issues in this case, which was essentially preliminary, Justice McCombe did make some important observations about the official handling of this archival material. He noted that one of the key issues at trial would be whether there had been a deliberate cover-up of the abuses, if so, who was responsible, and whether there were further attempts to impede investigation of the abuses.[14] He perceived force in the plaintiffs' submission that the Colonial Office, by permitting the destruction "embarrassing documents not deemed to be of historical value", gave the Kenyan government considerable leeway in the destruction of documents in order to conceal abuses and to protect the Colonial Office from embarrassment.[15] He went

[10] [2011] EWHC 1913 (QB) and [2012] EWCH 2678 (QB).
[11] *Matua v The Foreign and Commonwealth Office* [2011] EWHC 1913 (QB) at [1]
[12] At [1]; *Matua v The Foreign and Commonwealth Office* [2012] EWCH 2678 (QB) at 7.
[13] *Matua v The Foreign and Commonwealth Office,* above n 11, at [32].
[14] *Matua v The Foreign and Commonwealth Office,* above n 12, at [28].
[15] At [113].

on to observe, in relation to both the record destruction policy and the issue of the records which went missing, that "Clearly, deliberate destruction or concealment of embarrassing papers (if that occurred) could well be relevant to the case now made against the defendant."[16] The implication was that the destruction policy and the loss of documents taken together could create an inference that the Colonial Office did have knowledge of the abuses and had aided in concealment.[17]

From these cautionary tales, legal principles emerge to inform good archival regulation. Firstly, in order for the process of disposal to be perceived as legitimate it must be transparent. Records will have to be destroyed because of resource constrains, but so long as the reasons for destruction are clear there be little question of impropriety in the first instance. Secondly, and relatedly, to ensure the reasons for disposal are not tainted by political bias, it is useful to have review mechanisms or a politically independent decision-making body. The power of disposal should not reside solely with those officials who may have a vested interest in the concealment of records. Thirdly, there must be some form of review of the decisions. Disposal is an exercise of a public power and should therefore be amenable to review. Fourthly, there must be enforceable penalties for failure to comply with the stipulated process for decision-making. The New Zealand PRA does all of these things through the establishment and role of the Chief Archivist.

The requirement of transparency is fulfilled through the duties of the Chief Archivist, enumerated in section 11 of the PRA. To eliminate political bias in decision-making the Chief archivist is politically independent. Originally the PRA established the independence of the archives, as a state department, from its former position within the hierarchy of the Department of Internal Affairs.[18] This position has now been reversed. A 2010 amendment to the PRA brought Archives New Zealand back within

[16] At [118].
[17] Many Foreign and Commonwealth Office records continue to be withheld from the public, and probably for improper reasons. See Ian Cobain and Richard Norton-Taylor "Files on Colonial Crimes Still Kept Secret" *The Guardian Weekly* (United Kingdom, 3 May 2013) at 16.
[18] (16 September 2004) 620 NZPD 15775 at 15775-15776. This political independence, while fundamentally important for various resourcing concerns, was also considered and promoted as an important means of ensuring good government recordkeeping and public access to records. Contrast Archives Act 1957, s 6.

the Department of Internal Affairs, and the Chief Archivist is now appointed by the Chief Executive of that department.[19] This is unfortunate because the Chief Archivist's status is no longer commensurate with their obligations: they are lower officials expected to oversee and regulate the actions of higher officials.[20] However, the political and functional independence of the Chief Archivist is preserved by section 12 of the PRA, which provides that:[21]

> In relation to the performance of his or her functions and duties and to the exercise of his or her powers under sections 11(1)(b) and (d), 20(1), and 30, the Chief Archivist—
>
> (a) must act independently in exercising his or her professional judgment; and
>
> (b) is not subject to direction from either the Minister [responsible for Archives New Zealand] or the chief executive [of the Department of Internal Affairs].

This independence of the Chief Archivist is fundamentally important to ensure that disposal decisions are not made for improper purposes. The Chief Archivist is responsible for providing guidance to departments on good record keeping, and ultimately authorizes the disposal of records.

The Chief Archivist has wide-ranging duties in regard to official record keeping. These include taking a leadership role in recordkeeping in public offices,[22] which is ensures that records are maintained in a manner which facilitates disposal and access decisions. Section 11(1)(b) sets out the specific functions of the Chief Archivist in relation to "public records". "Records" are defined in s 2 very broadly so as to encompass any information in any medium, whether digital or physical, and whether written, visual, or audio. "Public Record" is defined more specifically as a "record"

[19] Public Records Act 2005, s 10(2), substituted on 1 February 2011 by section 6 of the Public Records Amendment Act (No 2) 2010 (2010 No 133).
[20] This obviously makes it harder for them to discharge their duties as they will not get the same level of respect from the officials which they are supposed to oversee and regulate in regard to recordkeeping.
[21] Public Records Act, s 12 as substituted on 1 February 2011 by section 7 of the Public Records Amendment Act (No 2) 2010 (2010 No 133).
[22] Section 11(1)(a).

created by a "public office" in the conduct of its affairs, but excluding records created by the academic staff or students of tertiary institutions. "Public Office" is also defined broadly to include the legislative, judicial, and executive branches of government and all the "agencies or instruments of those branches of government", thus essentially covering every single government agency, including State Enterprises and the Security Intelligence Service.[23] This description of "public records" informs the role of the Chief Archivist in ensuring the purposes of the Act are met. The Chief Archivist must ensure the: "systematic creation and *preservation* of public archives… to enhance the accessibility of records that are *relevant to the historical and cultural heritage*" (emphasis added).[24] To fulfill this purpose the PRA alters the record-keeping responsibilities of departments from prior responsibilities under the Official Information Act (OIA) and the Privacy Act (PA).

To achieve its purposes, the PRA imposed new duties not existing formerly under the OIA. Under the OIA a request for information may be refused if the information does not exist,[25] or if the agency in question does not hold the information.[26] These responses may be the result of the department having lost, destroyed or otherwise disposed of the records. The Ombudsman received complaints against departments for such actions under the Ombudsman Act. The Ombudsman stated that such complaints were assessed on the basis of reasonableness of the department's decision to dispose of the information, and the reasonableness of systems in place to ensure records were adequately kept and maintained, but expectations varied depending on the department in question.[27] The PRA enabled the Chief archivist to set new record keeping standards. Furthermore, it introduced new important duties for government departments. First, departments must keep "full and accurate records of their affairs in accordance with prudent business practice" and the records must become accessible

[23] A notable exception applies to certain ballot papers, voting papers, and voting documents sent to sent to the Clerk of the House of Representatives under section 187 of the Electoral Act 1993, or s 50 of the Referenda (Postal Voting) Act 2000 and specified materials received by Registrars of District Courts under section 89(2) of the Local Electoral Act 2001. See Public Records Act 2005, s 6.
[24] Public Records Act, s 3(f).
[25] Official Information Act 1982, s 18(e).
[26] Section 18(g).
[27] Office of the Ombudsman "Editorial: The Public Records Act" 11(3) (September 2005) Ombudsman Quarterly Review ISSN 1173-5376.

over time.[28] Second, departments and agencies cannot dispose of records without the authorization of the Chief Archivist.[29] This means that the Chief Archivist may investigate complaints against departments who claim they do not have the information if it is apparent or possible they failed in one of these duties. The Law Commission has recommended that the OIA be amended to make clear that complaints to the Ombudsman under the OIA in these circumstances should be referable to the Chief Archivist at the Ombudsman's discretion.[30] It should not be the Ombudsman's role to enforce the PRA. The PRA, therefore, generally imposes more stringent recordkeeping standards, formulated by Chief Archivist, on departments and agencies. Therefore the Chief archivist should be the person to enforce the standards.

To achieve the purposes of the PRA, records must be kept even though they may contain personal information. This has been a source of concern because of certain requirements under the PA, though these concerns are more theoretical than noticeably problematic in practice. In particular, it has been suggested by the Law Commission that Privacy Principle 9 could be interpreted to require that certain records containing personal information about identifiable individuals should be destroyed by government departments without going through the procedures set out in the PRA.[31] Principle 9 states that an "[a]gency is not to keep personal information for longer than is *necessary*" (emphasis added). This principle could be interpreted to suggest that records containing personal information should be destroyed if they are no longer necessary for the department. Although s 18(1) of the PRA provides that information cannot be disposed of without the authority of the Chief Archivist, this is subject to s 18(2) which exempts disposal of records "required" by another Act. If Principle 9 is interpreted as a "requirement" to dispose of certain records, it would prevail over the disposal process proscribed by the PRA. However, it has not been interpreted in this way. Principle 9 is elaborated: information is not to be held for longer than is required for the purposes for which it may "lawfully be used". The principle is permissive, and it should be interpreted to the effect that disposal in accordance with the PRA is a "lawful use".

[28] Public Records Act, s 18.
[29] Section 19.
[30] Law Commission *The Public's Right to Know* (NZLC R125, 2012) at 361.
[31] Law Commission *Review of the Privacy Act 1993* (NZLC R123, 2011) at 223-225.

The functions of the Chief Archivist under s 11 establish his or her role as the enforcer of a code on good information management. The Chief Archivist is to issue instruction on how to comply with the Act;[32] provide advice on the maintenance and management of records;[33] issue standards;[34] and issue the criteria for auditing departments' and agencies' compliance with the Act.[35] This is presently done through various guides and standards that aid government departments in implementing good recordkeeping practices.[36] These facilitate easy identification of the records held by departments and agencies; ensure preservation of records; and facilitate efficient identification of their historical value once a disposal decision is to be made. Furthermore, The Chief Archivist has the duty to monitor compliance with the Act, including the requirement that public records are not destroyed without the authority of the Chief Archivist.[37] Under section 61 of the Act it is an offence for anyone to damage, destroy or deal with a record in anyway otherwise than in accordance with the Act or regulations made under it. While the penalties for such offence could be more significant – maximum $5000 for an individual or $10,000 in any other case for an offence against s 61- they do give real enforcement power to the Chief Archivist.[38]

The most important protection provided by the PRA is that records may not be disposed of without the authorization of the Chief Archivist.[39] "Disposal" has a technical meaning in the Act. "Disposal" means the transfer of control over public records or sale, alteration, destruction, or discharge.[40] "Disposal" therefore includes the transfer of a record from the agency responsible for creating it to the control of Archives New Zealand (among other things) and does not imply destruction. There is a current Disposal Standard published by the Chief Archivist which imposes *mandatory* requirements for all government department and agencies except local

[32] Public Records Act, s 11(1)(b)(iv).
[33] Section 11(1)(b)(v).
[34] Section 11(1)(b)(ii).
[35] Section 11(1)(b)(viii).
[36] The relevant guides and standards can all be accessed at "Advice on Records & Archiving" <http://archives.govt.nz/advice>.
[37] Public Records Act, s 11(1)(b)(vi).
[38] Section 62(1).
[39] Section 11(1)(b)(i).
[40] Section 2.

authorities and schools.[41] This ensures special procedures and considerations must be taken in relation to disposal decisions of departments before they will be authorized. The Chief Archivist's role in this process is an important check on government departments, as it ensures that they are not free to destroy or alter (or otherwise deal with) records in a way (whether intentional or not) which might obstruct public access. The records of the Chief Archivist himself are subject to the scrutiny of the Archives Council, an independent body with limited functions related to advising the Minister in charge of Archives New Zealand.[42]

Transparency of the disposal process is enhanced by section 20 of the Act, which explains how authorization is granted and establishes an additional requirement of public notification of the decision. Section 20(1) states that the Chief Archivist may authorize the disposal of a record (in any of the senses of the word) in writing. Section 20(2) provides that the Chief Archivist, "in the manner the Chief Archivist considers appropriate," must give at least 30 days notice of the intention to dispose of records, informing the public of where further information is available, and where comments should be sent. While this duty appears somewhat discretionary in terms of the form in which the public disclosure is made, this recognizes the fact that little public interest will attach to the disposal of many records. These provisions are very significant part of the process to avoid any potential abuses of the system such as those which occurred through the quick decision made by the archivist in the "Heiner Affair".[43]

The system is not perfect: the PRA places a heavy burden on the Chief Archivist to ensure proper scrutiny of disposal decisions before giving authorization.[44] This burden, combined with the fact that the department itself will often have much more

[41] Archives New Zealand "Disposal Standard" Record Keeping Standard S9 (Continuum, June 2010).
[42] Public Records Act, s 15.
[43] Information in records may be retained in a different form or medium from that in which it was originally created to better facilitate public accessibility or reduce storage costs. This is often done in relation to the supply of information in response to individual requests under the Privacy Act and the Official Information Act. See, for example, Official Information Act, s 42; and Privacy Act 1993, s 16.
[44] Authorisation of disposal decisions is the one function of the chief archivist which cannot be delegated: Public Records Act, s 13(1)(a).

detailed knowledge of the records in question, leads to the possibility that the Chief Archivist may readily accept the department's own assessment of how the records should be disposed. This is a practical problem which leaves the system open to abuse, but not a legal problem, and the current legal safeguards seem adequate. The safeguards are reinforced by the standards issued by the Chief Archivist to facilitate decision-making. The current regulation further ensures proper procedures are in place, as far as reasonably practicable, to protect records from arbitrary or malicious destruction. However, the success of the PRA in ensuring public access to archival records is less clear.

Chapter 3: Regulating Access to Archival Material

The regulation of access to archives is more problematic than disposal. While the intention of the Public Records Act (PRA) is clear, the legislative wording and operation are not. The PRA was intended to improve upon the old archival regulation provided under the Archives Act 1957 (AA) by enhancing public access, and making the process of restricting material more flexible and transparent. However, the legislation does not in fact appear to improve either access or restriction because it places the discretion for restricting material in the administrative heads of the departments which created the records without providing them with sufficient guidance.. The process lacks transparency, causing decisions about access to be perceived by researchers as illegitimate. The source of the problems is a lack of a clear regulatory guidance as to principles underlying restrictions. These problems, though typically noted by various professional historical researchers, potentially affect all New Zealanders.

There are examples of poor restriction decisions by heads of departments under the AA which give credence to concerns. Under the AA officials were granted broad and poorly defined discretion to impose restrictions on archival material, resulting in harmful, improper, or absurd decisions. One instance involved records related to security police harassment of a left wing student in the 1950s, Hugh Price, as a result of his participation in a publication called *Newsquote*. The newspaper consisted primarily of American news articles concerning American foreign policy and the economy, copied verbatim, and although often critical of American policy, were taken from mainstream newspapers and caused little offence.[1] Those involved in the publication were mostly avowedly far left-wingers (Price was a member of the socialist club at Victoria University where he was studying) during the time of a conservative government headed by Sid Holland and the height of the "red scare".[2] Government security police of the Special Branch subjected the participants in the publication to an investigation and harassment,[3] which had wide-ranging

[1] Sarah Boyd "A Matter of Record" *Dominion Post* (Wellington, 19 February 2005) at 3.
[2] At 3.
[3] Predecessor to the Security Intelligence Service, formed in 1956.

consequences. Price, for example, was denied employment in public sector, refused various other jobs, and denied a visa to travel in the United States.[4]

In the mid 2000s (preceding the enactment of the PRA) Price made various attempts to access the records of the investigation, but the records continued to be restricted either in whole or in part by the Security Intelligence Service (SIS) to protect national security. 50 years or so had passed since the creation of the records. SIS director Richard Woods continued to justify the restriction on the basis that the materials "would reveal sources of information or methods that, despite the passage of the years, are still sensitive."[5] Price gained access to more information as a result of an Ombudsman investigation and found it included "a letter Mr Price wrote to the Listener in 1977."[6] With records like these already existing in the public domain it is difficult to understand why access was restricted in the first instance. Much of the information continued to be withheld. This example highlights the problems that can be caused by the placing of access decisions in the heads of relevant departments. Possible embarrassment to the SIS from the misguided investigation and subsequent persecution of those associated with *Newsquote* seems to have been the salient reason for restricting access to the records. The PRA offers little extra insurance of government accountability in this respect.

Another example that demonstrates the weakness of the former regulatory regime involved a bizarre decision to restrict the access to records which had been privately donated to the archives. Historian Barry Macdonald collected records in the course of research into phosphate mining on Nauru commissioned by the British Phosphate Commissioners (BPC). Nauru had been a German colony until it was transferred in trust jointly to Australia, New Zealand, and Britain under the Treaty of Versailles at the close of the First World War. It was these governments in partnership that established the BPC to administer the substantial phosphate exploitation industry on the island.[7] Macdonald collected a substantial amount of information: around 120 ring binders of papers, the majority of which was found in public archives in the UK,

[4] Boyd, above n 1, at 3.
[5] At 3.
[6] At 3.
[7] Barry Macdonald "Nauruan Phosphate and Public Policy: A Cautionary Tale of Private Papers, Public Archives and the Law" (April 1995) ARANZJ Archifacts 9 at 9.

Australia, and New Zealand, as well as a substantial portion provided by the BPC itself.[8] Ultimately the records were deposited with Archives New Zealand under section 11 of the AA[9] on agreed conditions with the Chief Archivist including that Macdonald would have 'continuing unrestricted access to the papers'.[10] However, problems arose when Nauru gained independence in 1968.

Upon independence the Nauruan government established a Commission of Inquiry to determine responsibility for rehabilitation of the island in consequence of the mining. The Commission found that, under international law, responsibility lay with the partnership governments and so Nauru instigated proceedings for redress in the International Court of Justice.[11] Case preparation required the Commission to acquire of as much evidence as possible. Relevant documents from the Ministry of Foreign Affairs and Trade (MFAT) in New Zealand, some of which had been publicly available for over a decade, were placed under new restrictions for an extended period by the Chief Archivist at the direction of the Minister of Internal Affairs under the AA.[12] Following a ruling by the International Court of Justice in 1992 that it had jurisdiction to hear the claim, Australia agreed to negotiate a settlement with Nauru out of court.[13] The Commission made requests to the New Zealand National Archives for parts of Macdonald's papers which alerted MFAT to the existence of these papers at the Archives.[14] This raised the question of whether the earlier Ministerial directive to restrict access applied to Macdonald's papers. A Crown Law opinion asserted that it did, and Macdonald himself was denied access. Macdonald challenged the decision by writing complaints to the Chief Archivist and the Ombudsman, with no success. He pointed out that the records were his own personal collection of papers from

[8] At 10.
[9] Archives Act 1957, s 11: "The Chief Archivist may accept for deposit in the National Archives any papers, documents, or records of any kind whatsoever that are of an historical nature but are not public archives, *subject to any conditions as to availability to the public or otherwise that are agreed upon between the person making the deposit and the Chief Archivist*" (emphasis added). Compare Public Records Act 2005, ss 42(1), 42(3)(c).
[10] Macdonald, above n 6, at 11.
[11] At 12.
[12] In accordance with s 20(1)(a) of the Archives Act. The Minister of Internal Affairs had been requested to put new restrictions on relevant material by the Minister of. Foreign Affairs.
[13] Macdonald, above n 7, at 15.
[14] At 16.

overseas or from New Zealand when the information therein had been in the public domain, and further, that the most politically significant parts of that information had already been published by himself in two books.[15]

This case explicitly demonstrates the importance of independent assessment of restriction decisions, or at least the necessity of clear guidance as to how decisions are to be made. However, the PRA has not remedied the deficiencies of the AA in these respects. Under the section 20(1)(a) of the AA the Minister of Internal Affairs could direct that restrictions be placed on records on the basis of public policy or to conform with the policy of other governments. No similar section exists in the current legislation, as the Chief Archivist is no longer subject to political control by the Minister. However, importantly, the Chief Archivist no longer determines restrictions: they are now determined by the relevant administrative head under s 43 of the PRA.

Under the current regulations there is no single law which regulates the publics' right to access archival records. Access is regulated under the PRA, the Official Information Act (OIA), and the Privacy Act (PA). The primary legislation regulating archival access is the PRA, although it gives surprisingly little guidance on the considerations for access decisions. Importantly, the PRA has the purposes:[16]

> (c) to enable the Government to be held accountable by—…
>
> (ii) providing for the preservation of, and *public access* to, records of long-term value; and … (emphasis added)

This purpose of providing public access is a central theme of the legislation. However, exactly how the legislation operates to achieve this goal is less obvious.

Records become subject to the access provisions of the PRA once they reach 25 years old, or have been transferred to the control (though not necessarily the custody) of Archives New Zealand. Unless the Chief Archivist authorizes another disposal decision, public records must be transferred to Archives New Zealand, or another

[15] At 18.
[16] Public Records Act, s 3.

"approved repository," after 25 years.[17] Transfer of the records may be deferred under s 22.[18] This is often done on the basis that it is necessary to protect the security or the defence of New Zealand.[19] Under s 26 it is possible for the Minister, on the advice of the Archives Council, to establish approved repositories, which are essentially archives held in repositories not owned by Archives New Zealand, but still subject to the same rules and regulations. These are subject to inspection by the Chief Archivist, who may make regulations or conditions to ensure, amongst other things, appropriate public access.[20] The Archives may also accept private records that document significant historical information about New Zealand.[21]

Once records are 25 years old or have been transferred to the control of Archives New Zealand the access provisions in Part 3 of the PRA are activated. With an entire part of the legislation devoted to regulating public access, it is surprising how little guidance can be gleaned from the PRA in regard to the principles informing public access. The general rule is stated in section 43(1): that when records are about to be transferred to the control of the Chief Archivist, they must be classified by the administrative head of the controlling public office as either open access or restricted

[17] Secotion 21; Records can be transferred before this date if the administrative head and the chief archivist agree to such in writing under s 21(2).
[18] Section 21(2)(c). This may be done by written agreement by the chief archivist and the head of the controlling department with a specific time period for deferral (22(1)(b)); if electronic records, the chief archivist can instruct the department to continue to maintain control of them (22(1)(c)); or the Minister responsible for the records, in consultation with the Minister responsible for archives, may instruct deferral for a specified period if the records are likely to disclose information that might do such things as prejudice the defence of New Zealand, or endanger any person.
[19] Section 22(1)(d), 22(6). This justification has been criticized as excessively obstructive of access to security records in New Zealand: Rachel Lilburn "Security Intelligence Records in New Zealand: A Case Study" (April-October 2003) ARANZJ Archifacts 1-16; (12 April 2005) 625 NZPD 19987 at 19993-19994.
[20] Public Records Act, s 26(2).
[21] Section 42. This could potentially cause serious problems with imposing access restrictions because appealing access restrictions is to be done in accordance with the previous regulatory regime to which the information was subject – usually the OIA oe PA – but such records were never subject to a regulatory. They will most likely be open unless the donors impose conditions, as was the case under the Archives Act. See Office of the Ombudsman "National Archives and OIA" 6(1) (March 2000) Ombudsman Quarterly Review ISSN 1173-5376.

access.[22] Under the AA the Chief Archivist had ultimate responsibility for this decision, but now that position has been reversed.[23] Giving administrative heads of the departments responsibility to determine the access status of their own records was a significant cause for concern for the Green Party during the passage of the Public Records Bill through Parliament.[24] They argued it invited the possibility of improper motives when making such decisions – for example restricting access to prevent accountability for departmental misfeasance or corruption.

Section 44 provides the "[b]asis for determining the access status". The administrative head, when making the determination, must consider whether there are "good reasons" for restricting access, taking into account relevant standards issued by the Chief Archivist, or requirements under other legislation.[25] If no reasons can be applied to the records then they *must* be classified as open access.[26] If there are "good reasons" for restricting access, then the administrative head of the department, in consultation with the Chief Archivist, must decide whether to restrict public access to a record for a specific period of time and/or impose conditions on access.[27] However, the legislation is unclear as to what might constitute a "good reason", and does not elaborate on the specific considerations to be applied.

These ambiguous processes appear to give excessive discretion to the heads of government departments. Aside from the requirement to act 'in consultation' with the Chief Archivist, their discretion seems essentially unfettered. Cause for concern was raised by the experience of former Chief Archivist Kathryn Patterson who commented "administrative heads have a tendency to regard restrictions as the rule rather than the exception."[28] She suggested that the legislation establish a more prominent role for the Chief Archivist as a "referee or arbiter" on such decisions.[29] These concerns were

[22] This classification may subsequently be changed under s 43(2) of the Public Records Act.
[23] Archives Act, s 8.
[24] (16 September 2004) 620 NZPD 15775 at 15779-15780; (12 April 2005) 625 NZPD 19987 at 19992-19993.
[25] Public Records Act, s 44(1).
[26] Section 44(2).
[27] Section 44(3).
[28] (12 April 2005) 625 NZPD 19987 at 19992.
[29] At 19992.

not acted upon. Because the Act itself is relatively unclear on the issues to be considered in making access decisions, it is necessary to look to the standards and guidelines issued by the Chief Archivist, and the other significant legislation governing access to official information: the OIA and the PA.

The Chief Archivist has issued guidelines on how access decisions are to be made.[30] These do not set out mandatory requirements, but they point to the legal requirements to comply with other legislation. The introductory section gives a significant explanation that could easily have been legislated into the PRA itself. This is that "restricted access" records continue to be governed by the access regime to which they were subject prior to becoming subject to the PRA.[31] Thus "good reasons" for restricting access will be reasons which would justify withholding information under the prior legislative regimes to which the records were subject. Such reasons will almost exclusively come from the OIA.[32] The process involves competing public interests: "a good reason may be said to exist where the public interest in withholding records outweighs the public interest in making records available."[33] Those reasons for withholding specific records or parts of records under the OIA become justifications for imposing restrictions on whole classes of records for specified periods of time under the PRA – not a purpose for which the OIA was designed.

The OIA sets out what should be the only relevant considerations for access decisions on archival records. Under the OIA there are four groups of good reasons for withholding information that relate to specific forms of prejudice or harm that disclosure may cause. There are substantive public interest reasons; reasons which

[30] Archives New Zealand Guidelines *Making Access Decisions under the Public Records Act* (Issued in 2001/revised in 2005) <http://archives.govt.nz/advice/continuum-resource-kit/continuum-publications-html/a6-making-access-decisions-under-public-re>.
[31] At [1.2].
[32] There are many other statutes that govern restrictions on access to specific records including the Criminal Records (Clean Slate) Act 2004, the Adult Adoption Information Act 1985, and the Inland Revenue Act 1974. There are also records which may be received by Archives New Zealand which were not subject to any regulatory regime, such as certain papers deposited by private individuals – for such records there is no guidance whatsoever as to when and how restrictions might be imposed. The reasons may also come from the Local Government Official Information and Meetings Act 1987.
[33] *Making Access Decisions under the Public Records Act*, above n 29, at [2.1].

protect the integrity of government; reasons applying specifically to foreign dependencies; and administrative reasons. The most common reasons for restricting access to archival material are to be found in sections 6 and 9 of the OIA. Section 6 provides five "conclusive reasons" for withholding specific information. These become "good reasons" for restricting access under the PRA to an entire class of records, and include records that are "likely" do things such as prejudice the defence of New Zealand, or endanger the safety of any person. Section 9(2) of the OIA provides "other reasons", where records may be withheld if "necessary" to protect such things as personal privacy, and public health and safety. Section 9(1) mandates a balancing test for the public interest: there must be a determination that the interests protected by withholding (or "restricting" under the PRA) are outweighed by the public interest in disclosure. Further it is a test of "necessity" – "reasonable" necessity as opposed to "strict" necessity – to protect the interests in question.[34] The general presumption under the PRA is that records which reach the age of 25 years will no longer have any such interests attached to them. But if they would be "likely", which means in this context simply that they have a distinct or significant possibility of satisfying s 6,[35] then there is "good reason" for restricting public access to a class of records under the PRA.

The PA is supplementary and complementary to the OIA in that it provides a right of access to personal information held by agencies by the people whom the information concerns. Part 4 of the Act provides "good reasons" for denying access to information about an identifiable individual which essentially mirror the "good reasons" for denying access to official information in the OIA. [36] The most significant additions to those considerations are found in the Privacy Principles in section 6. Most relevant in this context is principle 10, which limits the "use" of personal information, and principle 11, which limits the "disclosure" of personal information. While both of these principles seem to cut against the use or disclosure of personal information in accordance with the PRA, the PA principles are subject to other inconsistent laws.[37]

[34] *Television NZ v Ombudsman* [1992] 1 NZLR 106 at 118.
[35] *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 391.
[36] "Identifiable individuals" are defined under s 2 of the PA as "living" natural persons while the Official Information Act extends further to personal information about legal/corporate persons.
[37] Privacy Act, s 7. See especially 7(1), 7(2) and 7(4).

As such, the principles serve more to reinforce and inform the protection of privacy provided for in the OIA. The Chief Archivist has acknowledged the need "to prevent the disclosure of *sensitive* personal information."[38] Thus the public interest in protecting *sensitive* personal information must be weighed against the competing public interest in favour of disclosure. Protection of privacy thus does not require blanket secrecy but will be depend on the perceived sensitivity of the personal information.

These provisions (both the "conclusive" and "other" reasons under the OIA) are grounds for withholding specific pieces of information following a request. They are not designed for pre-determining restriction periods for classes of records. Yet restriction periods must be specified under the PRA. There are evidently two decisions to be made by a government department when disposing of records under the PRA:

1) Whether to restrict access; and
2) If access is restricted, how long should restrictions last for and what other conditions might have to be imposed.

The first decision should be straightforward, and depends exclusively on whether "good reasons" apply under the OIA. This requires clarification, however, as other reasons for may restriction have been posited. The grounds for restricting access in the guidelines provided by the Chief Archivist include concern for the interests of Māori in protecting certain traditional knowledge in the form of "sensitive information regarding people, places or cultural practices".[39] Yet this reason is not in the OIA unless it somehow falls under the "obligation of confidence" justifiction.[40] Alternatively it may be that it is intended to reflect the withholding justification "to avoid serious offence to tikanga Maori, or to avoid the disclosure of the location of waahi tapu" contained in the Local Government Official Information and Meetings Act.[41] But this seems unlikely as that section only has limited application to certain consents under the Resource Management Act 1991, whereas the Archives New Zealand description of interests is much broader. This is not to say that Māori cultural

[38] *Making Access Decisions under the Public Records Act*, above n 29, at [5.1].
[39] At [5.1].
[40] Official Information Act, s 9(ba).
[41] Local Government Official Information and Meetings Act 1987, s 7(ba).

interests should not protected, but that if this is desirable it must be clearly legislated as reasons for withholding in the relevant legislation.[42] It is important that the reasons for restricting material are constrained to those in the OIA[43] to prevent abuse of the system through the application of amorphous reasons for withholding.

The second decision is much more problematic. This requires, having decided that there are "good reasons" to restrict access, determining what the restriction period should be. Additional guidance is needed in order to make the process function better.[44] Archives New Zealand has provided some limited guidance. Various examples are provided in the guidelines of restriction periods for specific classes of documents. One example offered is the period required to protect records which contain sensitive information which might prejudice national security. Postulated records of this nature are those relating to general military planning, security and intelligence, with a suggested restriction period of 30 years.[45] However, the guide is fairly general and does not impose any mandatory considerations or duties. At present restriction decisions are not adequately transparent or comprehensible. The beauty of the access provisions in the PRA is that they approve "restrictions" on access, which means access must be controlled, but never unconditionally prohibited. The key safeguard to public access is that restrictions must be for a specified period – but this is exactly where the greatest difficulties exist for decision-makers, and where the current regulation has its greatest inadequacies. Restrictions placed on classes of records will always be arbitrary, and therefore transparency must be maintained by a clear authoritative enunciation of the principles to be applied when deciding how to restrict material.

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[42] For a good explanation of some Māori perspectives on archiving see Whatarangi Winiata "Survival of Maori as a People and Maori Archives" (April 2005) ARANZJ Archifacts at 9-20. For a suggestion by the Law Commission that new cultural grounds for withholding be entered into the OIA see Law Commission *The Public's Right to Know* (NZLC R125, 2012) at 136-137.

[43] Or those in the Local Government Official Information and Meetings Act in the case of local authorities.

[44] It is unclear whether this is a necessary requirement under the PRA or just best practice – see Public Records Act, s 44(3). It should be understood as a mandatory requirement, and the Chief Archivist seems to consider that it is: *Making Access Decisions under the Public Records Act*, above n 29, at [2.3].

[45] At [5.1].

The problems with the current regulatory framework are demonstrated by the treatment of patient mental health records; records containing highly sensitive information which are obviously justifiably restricted under the OIA. The Otago District Health Board restricts access to patient mental health records for 100 years from the closure of the patient file.[46] Mental hospital records in Auckland are only restricted for 70 years.[47] Thus patient records publicly available in Auckland would not necessarily be available if held in Otago. Wellington has a completely different system of restriction for such material. Despite the instructions of the Chief Archivist that restrictions should always be for a "finite" and specified period of time,[48] the Ministry of Health has restricted mental health records in Wellington indefinitely, though providing special procedures and conditions for access.[49] These discrepancies in relation to records of obvious sensitivity demonstrate a clear lack of guidance for, and understanding by, government departments and agencies as to how to weigh relevant interests in making restriction decisions. Inconsistency itself is undesirable, but it is also a source of concern because it implies that the administrative heads of departments retain a large degree of discretion. As was demonstrated at the outset of the chapter, this problem that can have serious consequences for both individuals and society. Strict rules may not be the best approach because different departments are never going to produce identical records. What is required is a more transparent process for decision-making that is based on clearly defined legal principles of access.

A perfect system will never be attainable, but there is certainly room for improvement. Regulations akin to the Privacy Principles in the PA could be used to clearly articulate the relevant interests to be weighed. Using privacy as an example, the factors which may determine the degree of sensitivity could be clearly articulated. These would include consideration such as whether an individual provided the information to a department voluntarily, or whether it was a legal requirement that the information was provided (such as census information). The latter should clearly be treated as more

[46] Archives New Zealand "Mental Health Research Guide: Dunedin Office" <http://archives.govt.nz/research/guides/mental-health#dn>.
[47] Archives New Zealand "Mental Health Research Guide: Auckland Office" <http://archives.govt.nz/research/guides/mental-health#auck>.
[48] *Making Access Decisions under the Public Records Act*, above n 29, at [2.3], [3.8].
[49] Archives New Zealand "Mental Health Research Guide: Wellington Office" <http://archives.govt.nz/research/guides/mental-health#well>.

sensitive because the information was not volunteered by the individual, rather they were compelled to provide it, perhaps against their will. Similarly it will often be necessary to weigh the degree of confidence that was reasonably believed to exist by the person providing the information. Information provided in a relationship of confidence, such as doctor-patient confidentiality, will obviously be of high sensitivity. But it may also be relevant whether people giving information to department are under a reasonable belief that their information will be kept confidential, or only used or disclosed for specified purposes.

While the interests of researchers in accessing information remains constant, the interests in favour of withholding information diminish over time. Restriction periods or conditions on access must adequately reflect the interest protected. Once it is established that personal information is highly sensitive because it was disclosed in the course of a relationship of confidentiality, how long should access be restricted? This is a matter of policy on which guidance could and should be given. Did the individual(s) offering information reasonably believe confidentiality would extend for the duration of their lifetime or longer? Providing guidance on such important matters could equally aid the regulation of other forms of information such as information relating to national security. There is a consistently high public interest in such information, but what classes of information can legitimately be restricted in accordance with this concern, and how do interests in protecting such information diminish over time? By finding the answers to such questions, the determination of restrictions could be made far more straightforward, transparent and comprehensible. Regulation of this sort would generate a greater degree of confidence in the system. This would also facilitate efficient review, and the provision of exceptions to restrictions.

Chapter 4: Reviewing Access Decisions and Granting Exceptions

Once a decision to restrict access under the Public Records Act (PRA) has been made access is not prohibited, even during the restriction period. There is confusion because of the interplay between the PRA, Official Information Act (OIA), and Privacy Act (PA), as to how to seek access to restricted material. This is a relatively simple matter which could be made more explicit in the legislation: access to restricted material is subject to the same procedures as it would have been prior to the records becoming subject to the PRA. Most often, therefore, the only review mechanism available will be a complaint to the Ombudsman under the OIA. The Ombudsman, however, is not equipped to deal with these complaints because the office lacks the time and resources. New Zealand's review mechanism for access decisions are weak, especially when considered in light of those provided in comparable jurisdiction such as Australia, Canada, the United States of America, and the United Kingdom. Although there is the further possibility of judicial review of access decisions in New Zealand, this process is impracticable because of the cost.

It is logical that the department responsible for the restricting material is also responsible for review of that decision in the first instance. However, it is not obvious from the PRA how exceptions can be sought. The Law Commission noted that the public is sometimes uncertain as to which regulatory regime applies to requests for access to archival information.[1] As "good reasons" for restricting access to information are those outlined in the OIA, exceptions from restrictions or review of restriction decisions will require OIA requests to the relevant department, even if they are no longer in physical possession of the records. If requesters want to access restricted records because they believe that they contain personal information about themselves, then they may apply in accordance with the PA. The PRA itself does not make this process of requesting clear.

[1] Law Commission *The Public's Right to Know* (NZLC R125, 2012) at 362.

Open access records in the possession of Archives New Zealand are no longer subject to the OIA.[2] Section 44(8) provides that "controlling public offices" are responsible for requests for official information and personal information under the OIA and PA respectively. Section 4 explains a "controlling public office" is a public office which has the "power to determine the conditions of access to [a] public archive". The implication is that restricted records are to be requested from the relevant department under the OIA and the PA, but this is only stated explicitly in guidelines from the Chief Archivist.[3]

This means the only practical form of review will be by complaint to the Ombudsman. Complaints to the Privacy Commissioner in regard to denials of access to archival material will be rare. With only about 25 Privacy Commissioner cases reported annually out of some 800 to 1000 cases, no instances are known. A complaint could only be made to the Privacy Commissioner if: someone sought access to archival material; the information was personal information about the requester him or herself; and the information was withheld. These circumstances would amount to a breach of Principle 6 of the PA.[4] Yet denial of access to archival material containing personal information will often be justified under the reasons for withholding in the OIA, and thus an OIA request could still be made. Therefore complaints to the Ombudsman under the OIA are likely to be the primary means of reviewing a restriction.

The current system with the Ombudsman as the primary protection for reviewing access decisions is unsatisfactory. The Ombudsman is already under-resourced and has a very broad jurisdiction to investigate any "matter of administration and affecting any person or body of persons in his or its personal capacity" covering a very broad

[2] Public Records Act 2005, s 58. This is an odd section, but it is most likely alluding to this fact and the fact that privately donated material is not subject to the Official Information Act.
[3] Archives New Zealand Guidelines *Making Access Decisions under the Public Records Act* (Issued in 2001/revised in 2005) <http://archives.govt.nz/advice/continuum-resource-kit/continuum-publications-html/a6-making-access-decisions-under-public-re> at [1.2].
[4] While it is normally a requirement to prove a breach of the Privacy Act that some harm or loss resulted from the breach, this is not the case in regard to a breach of Principle 6. See *Winter v Jans and Jans* HC Hamilton CIV-2003-419-854, 6 April 2004.

range of government Ministries, departments and agencies.[5] Aside from the complaints jurisdiction under the OIA and investigatory functions under the Ombudsman Act, the Ombudsman has many other important statutory functions under other legislation.[6]

The annual report of the Ombudsman for the 2011/12 period stated that the office was struggling to meet its timeline targets given the volume of work, having received a total of 10,636 complaints for the year (under the various jurisdictions), an increase in complaints of 22% from the 2010/11 period.[7] The volume of OIA complaints has increased 35% since 2009/10.[8] The resourcing problems are becoming a serious cause for public concern, with the *Dominion Post* reporting a recent "unprecedented surge" in complaints, with a current backlog of over 2000 complaints.[9] Complaints in relation to archival material are unlikely to be given high priority: the primary interest in the release material under the OIA is more immediate government accountability as opposed to heritage. Requests for archival material will undoubtedly be perceived less urgent, resulting in long delays.

It is questionable too whether the Ombudsman is well placed to review access decisions on archival records. The interests in restricting such material diminishes in ways not normally dealt with by the Ombudsman under the OIA. While the problems could arguably be resolved by simply increasing the resources for the office of the Ombudsman, this would not be the most efficient or logical approach for two reasons. Firstly, the roles of the office have simply become too diffuse to focus on freedom of information (FOI) issues effectively. The office's primary role is to deal with prisoner complaints and prison conditions, but with the accumulation of duties in regard to receiving complaints for many and varied government actions, it unreasonable to expect the office to adequately discharge duties under FOI legislation. Secondly, it is apparent that the Ombudsman is not capable of oversight of all FOI – this recognition necessitated the establishment of the offices of the Chief Archivist (overseeing

[5] Ombudsman Act 1971, s 13(1).
[6] Including the Local Government Official Information and Meetings Act 1987, the Protected Disclosures Act 2000 and the Crimes of Torture Act 1989.
[7] Office of the Ombudsman *Annual Report of the Ombudsman* (30 June 2012) at 6.
[8] At 40.
[9] "Complaints Piling Up" *Dominion Post* (Wellington, 27 September 2013) at A5.

records management) and Privacy Commissioner (overseeing compliance of government with privacy law). The establishment of these different offices is a resource-intensive system as it leads to a lot of "double-handling" of complaints: complaints to the Ombudsman often need to be re-directed to the Privacy Commissioner or Chief Archivist and vice-versa. The system is inefficient because there is no consolidation of experience, expertise, or oversight in relation to information management, and no centralized system for creating relevant rules. These problems can be remedied through the implementation of a better process for determining restriction periods, as recommended in the previous chapter,[10] and the inauguration of a dedicated authority for the review of restriction decisions.

Part of the problem is the disjunction between the treatment of records under the PRA and the OIA: the PRA treats information in classes while the OIA deals with information on an individual, case-by-case basis. The Danks Committee, responsible for the original formulation of the OIA, had intended there to be an ongoing formulation of pre-emptive rules for treating information by category (or class), but this never eventuated.[11] The case-by-case system for dealing with information requests under the OIA is unique to New Zealand, and incredibly resource-intensive.[12] No other country has a comparable system, with most having some form of classifying series records to facilitate efficient access decisions. This current OIA system is the cause of much of the pressure placed on the Ombudsman: the combination of modern electronic records, frequent broad OIA requests, uncertain principles to be applied, and expectations of timeliness make the Ombudsman's role almost impossible.[13] The PRA, with its implementation of the class system for access decisions, presents an opportunity to better formulate key principles underlying access decisions. The disjunction between the two pieces of legislation is odd, and perhaps suggests that it is time to consider imposition of a class system uniformly on records under the OIA, as commentator Nicola White has argued.[14] However, at the very least

[10] For discussion, see Chapter 2 at 35-37.
[11] Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 93, 248.
[12] At 249.
[13] At 93-94.
[14] At 247-249.

clear guidelines should be provided for restricting classes under the PRA to facilitate more efficient assessment of access requests made under the OIA.

To facilitate timely and efficient reviews of restriction decisions, and reduce the burden on the office of the Ombudsman, there should also be a different process for review. Various alternative mechanisms used for reviewing access decisions in similar jurisdictions around the world. Canada, Australia, the United Kingdom (UK), and the United States of America (USA) all deal with the same issues in regard to reviewing decisions to restrict archival access. All of these countries have freedom of information (FOI) regimes similar to New Zealand, but all tackle the problem of reviewing access decisions in different ways.[15] Most regimes, like New Zealand's, draw no distinction between reviewing official information and archival access decisions. Australia has more specialized review mechanisms specifically for archives. All of the countries examined aside from the USA have some form of dedicated authority which reviews decisions. The best approach for New Zealand would be to create a new office for an Information Commissioner, as exists in the UK and Canada, which could fulfill duties under all significant FOI legislation. This would facilitate consistency and clarity in decision-making and free up resources for the Ombudsman.

Alternatively, the Chief Archivist could be granted greater powers of review for restriction decisions under the PRA, as is essentially the current process for review in Australia.[16] Consistency with decisions of the Ombudsman under his/her continuing OIA jurisdiction may be an issue, but the decision reviewable under the PRA is different: the question will most often be whether the specific record requested matches the class restriction to which it is subject, and, if so, whether the interest has expired. This is similar but different to the assessment the Ombudsman makes under the OIA, which is whether the record is justifiably withheld under the OIA. As the Chief Archivist is responsible for formulating the standards and guides for restricting information under the PRA, it would make sense for him/her to review the decision.

[15] For a thorough comparative analysis of the FOI regimes in these countries, see Robert Hazell and Ben Worthy "Assessing the performance of freedom of information" (2010) 27(4) Government Information Quarterly 352–359.

[16] This may also require the political status of the Chief Archivist being increased to ensure they command sufficient respect. See the brief discussion on the current status of the Chief Archivist in Chapter 2 at 20.

The Law Commission has recommended the establishment of a dedicated authority, but their conception of the role of such an authority is too narrow. In their report *The Public's Right to Know* they list the problems arising from a lack of centralized oversight of government compliance with FOI legislation and propose the establishment of a new independent office of an Information Commissioner.[17] This Commissioner, they propose, would provide leadership, oversight, guidance and reporting on the operation and implementation of the OIA and the LGOIMA.[18] But, for the most efficient consolidation of costs and expertise it would be desirable for such an authority to also take on these duties with regard to the PA and the PRA, to ensure true oversight of, and consistent guidance and decision-making on all legislation affecting FOI. The Law Commission states that they consider the role of the new oversight authority should remain separate from the complaints jurisdiction of the Ombudsman.[19] One questions why this should be so: surely the new authority would be far better placed in terms of expertise to fulfill this role. The Law Commission proposal does not therefore adequately tackle the problems presented by the review mechanisms under FOI legislation.

An additional question relates to appeals from the decision of whatever review authority is established. Under the current system further reviews are available under judicial review but are impracticable because of expense. At present if an Ombudsman recommends that information be made available under the OIA, that department comes under a "public duty" to release the information.[20] The department has a legally enforceable duty to comply with the recommendation, unless the Executive overrides the duty by Order in Council.[21] The power to issue such an Order

[17] *The Public's Right to Know*, above n 1, at Ch 13, and specific recommendation at 322.
[18] At 317-318, 325.
[19] At 320.
[20] Official Information Act 1982, s 32.
[21] Sections 32(3), 32(4). The "public duty" & "Order in Council" override do not apply to access to "personal information" under the OIA (which involves information about a legal, not a natural person; natural persons fall under the Privacy Act), which comes under s 35 of the OIA. Here, there is a "right" to the information if the Ombudsman says so, or the complainant can go directly to the Court to get a declaration to that effect.

in Council is also judicially reviewable by the requester.[22] The powers of the Ombudsman in relation to reviewing an access decision could easily be transferred to an Information Commissioner, or the Chief Archivist, to reduce the burden on the Ombudsman. It is desirably to reduce the costs of further appeal: an appeal from a decision of the new authority should be available to a lower tribunal.[23]

The Canadian federal review system is essentially very similar to that in New Zealand, but provides a dedicated authority for reviewing access decisions that has the power to initiate proceeding. Canada has an FOI regulatory framework akin to the OIA in New Zealand which governs access to restricted material.[24] The Access to Information Act 1982 guarantees public access to records created and/or held by federal government agencies.[25] The general guarantee of access is subject to various exceptions contained in ss 13 to 26 which mandate refusing requests to certain types of records such as those containing information obtained on a confidential basis from another government or international organisation, or information that, if released, would undermine national defence, and other grounds similar to the withholding grounds in the OIA. The problems of reviewing decisions will obviously be very similar to those arising in New Zealand, but the process for review is different. If a requester is refused access to information by a department, a complaint can be made to the Information Commissioner – an independent Commissioner appointed by Parliament who is dedicated solely to FOI regulation.[26] The Information Commissioner has strong investigatory powers,[27] but may not make any binding decisions, and instead makes recommendations in order to mediate the dispute.[28] Following a complaint to the Commissioner, the requester can apply for review of the

[22] Section 32B.
[23] This is the current system in Australia, and in New Zealand under the Privacy Act 1993.
[24] The National Archives and National Library of Canada, which form a single institution, are administered in accordance with the Library and Archives of Canada Act 2004.
[25] Access to Information Act RSC 1985 c A-1, ss 3, 4. Records are defined as Defined as "any documentary material, regardless of medium or form" under s 3.
[26] Section 30.
[27] Section 32-36.
[28] Section 37(1).

matter to the federal court.[29] If the Commissioner sees fit they can initiate proceedings in the federal court for review of the decision.[30]

This system of review and appeal is much more straightforward and efficient than the current system in New Zealand. The establishment of an Information Commissioner, who takes on the duties required for all information collection and access issues is much more logical than placing such duties in an Ombudsman, whose duties are already many and varied. This ensures consistency between decisions, greater efficiency, and greater familiarity with the issues at stake. Aspects of this system, however, are less suited to the current regulatory framework in New Zealand. The fact that the decision of the Commissioner is not binding would not be ideal in New Zealand. This is because enforcement requires review of the matter by a federal court. Such a system works best in litigious societies such as Canada and the USA where the courts are arguably more accessible, at least financially.

Access to archives of the federal government in the USA are governed by the Freedom of Information Act 1966 (5 U.S.C. § 552). Unlike Canada the USA provides no special independent person or agency to assess complaints. Rather, like New Zealand, appeals are first to be made to the agency itself, which must have procedures in place to internally review decisions.[31] But like Canada, if the agency still refuses, there is a general right to appeal to a federal court.[32] Such a system is simply not practicable in New Zealand. No one in New Zealand would appeal to the courts because of a decision of an agency to withhold archival information because it is simply too expensive. The UK provides a better approach in this regard.

Access to archives in the UK is governed by the Freedom of Information Act 2000, which came fully into force in 2005. Information is accessible to the public unless one of the "exemptions" contained in ss 21- 44 of the Act applies. These are essentially the same or similar to those in the OIA or comparable Canadian and USA legislation. If an archival record is "closed" (not open to the public) a requester can make a

[29] Section 41.
[30] Section 42.
[31] The Freedom of Information Clearinghouse "The Freedom of Information Act: A User's Guide" (Revised May 2011) at 11.
[32] At 12.

Freedom of Information Request. Unlike in New Zealand, such requests are not reviewed solely by the relevant department, but by the archival authority in consultation with the department. Like Canada, the Act establishes a special Information Commissioner, who has similar functions to the Chief Archivist in New Zealand in regard to oversight of government recordkeeping, and who can receive complaints against departments for not complying with the Act.[33] The Commissioner can make binding decisions by serving the department or agency with an enforcement notice, compelling it to make or rectify decisions, though the department is given an appeal right.[34]

If the department fails to comply the Commissioner can give notice of this fact to the High Court, which deals with the department as though it had committed a contempt of court.[35] If the information has been restricted by a "national security certificate"[36] the requester or the Commissioner can apply to a special Tribunal to have the certification set aside.[37] The powerful role of the Commissioner, and the role of the Tribunal in the narrow circumstances of a "national security certificate", generally negate the need for recourse to civil action unlike the US and Canada.[38] This system would be more desirable for New Zealand as it would ensure the public had a right to review access decisions with minimal cost, placing the cost of appeal instead on the government department. These powers in New Zealand could be invested either in an Information Commissioner, responsible for all access decisions, or invested more narrowly in the Chief Archivist for access decisions solely concerning archives as is done in Australia. It is less clear whether there is any avenue for recourse in a case where the Commissioner does not find in favour of the requester and the issue is not a "national security certificate". In this circumstance Australia has a good solution: tribunal review.

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[33] The office of the Commissioner is established under s 18 of the Freedom of Information Act 2000. For the Commissioner's duties see s 47. The Commissioner's complaints jurisdiction is mandated under s 50.
[34] Freedom of Information Act, s 50.
[35] Section 54.
[36] This is a special certification for particularly sensitive information.
[37] Freedom of Information Act, s 60.
[38] As such, civil action is barred under s 56.

Access to archival records in Australia is governed by the Archives Act 1983. Records will generally be open to public access in accordance with s 31 of the Act, but are subject to exemptions from public access, for the essentially the same reasons as the OIA, under s 33. The Director General of National Archives discharges the primary functions under the Act in a similar manner to the Chief Archivist in New Zealand.[39] The Archives provide reasons for why the records were restricted by the Director General in consultation with the responsible Minister, and have an internal review process if the requester does not agree.[40] Failing satisfactory resolution, an aggrieved requester can make an appeal to the Administrative Appeals Tribunal for review of the decision and order disclosure of the information.[41] Further appeals from the Tribunal decision may be made to a federal court on points of law.[42] There is also a right to complain to the Ombudsman, but this is limited to complaints concerning procedural aspects of the handling of requests by National Archives.[43] Recourse to a tribunal to hear appeals is a measure that would be desirable in New Zealand, to ensure justice on the case can be done without the economic impediment that taking a claim to court poses. This is already done for complaints under the PA, so it would certainly seem feasible do so under the PRA or the OIA.[44]

The best solution to ensure adequate review mechanisms for archival restriction decisions requires firstly, authoritative guidance on making access decisions. Secondly, it requires the establishment of a better system of review of those decisions to ensure reviews can be conducted in a timely and efficient manner, and remove some of the burden from the office of the Ombudsman. This could be done through the use of a composite of systems used in Canada, UK and Australia in one of two ways. To marginally reduce the burden on the Ombudsman, and ensure timely reviews of access decisions, greater power could be invested in the Chief Archivist, as an arbiter of such disputes, to issue binding decisions. Alternatively, to greatly reduce

[39] Archives Act 1983 (Cth), Part 3.
[40] Sections 35, 42.
[41] Sections 43-44. This is a special tribunal which independently reviews decisions of Australian government agencies.
[42] National Archives of Australia "Access to records under the Archives Act – Fact sheet 10" (2013) <http://www.naa.gov.au/collection/fact-sheets/fs10.aspx>.
[43] Archives Act, s 55.
[44] Complaints under the Privacy Act can be taken, in accordance with ss 82-83, to the Human Rights Review Tribunal.

the burden on the Ombudsman, a dedicated Information Commissioner could be established to oversee decisions on all issues of access and withholding of information under the various pieces of relevant legislation. Either one of these options would be an improvement on the present system, although the latter is preferable. Finally, the review of decisions of the newly established authority should be subject to further appeal to a tribunal. In this way the public rights of review and appeal can be facilitated efficiently, ensuring fairness and confidence in the system.

Conclusion

Archives form an important part of the democratic and constitutional system of New Zealand. Researchers and the public at large have an interest in getting the truth about governmental decision-making. In this respect policies on archives fit into the broader framework of regulation concerned with the public's right to access official information, particularly the Official information Act. New Zealand's current regulation of archival access is by no means completely unsatisfactory. The Public Records Act has introduced important new protections to ensure both good government record-keeping and that records will be preserved for the benefit of posterity. Significant innovations in the duties and role of the Chief Archivist as an independent officer to guide recordkeeping throughout the public sector, and authorize any disposal decisions, are fundamentally important and are particularly exemplary features of our regulatory system. Further, they safeguard access by ensuring that records will be available in the future. However, there are problems with the regulation of access itself in that it lacks transparency and adequate accountability mechanisms. These problems can be fixed by the provision of clear guidance on how restriction decisions are to be made, and re-assessment of our current system for review.

Ameliorating problems associated with the determination of restriction periods should not be difficult. Although the Public Records Act imposes on government departments new ways of treating official information – by class rather than by individual record – there is no reason why the determination of restrictions in line with the Official Information Act should be difficult. What is required, however, to facilitate this process is more authoritative guidance on how government departments or agencies should do this. While the Official Information Act clearly provides reasons for withholding information, it does not suggest how to determine the way in which these interests might diminish over time. The Official Information Act was not designed for this purpose. Without clear guidance on how the periods of restriction are to be calculated, that is, without clear articulation of how various legal interests diminish over time, government agencies will continue to struggle to make reasoned determinations. The current problem has various further consequences.

If the decisions on restriction periods are not properly justified they frustrate researchers because they appear illegitimate. Furthermore, if it is unclear exactly how the interests listed in the Official Information Act are to be protected it is equally unclear when exceptions should be made. This is unacceptable when restriction decisions are made on classes of records which may well contain information which does not have the relevant interest attaching to it, or contain records where the interest has obviously expired. A department will make exception decisions far more efficiently when the rules for imposing restrictions are clearly articulated. Departments and agencies will obviously err on the side of caution when reviewing restriction decisions when they are themselves not clear on how restrictions should be imposed. This means that few exceptions are likely to be made even though good reasons for making exceptions exist. This in turn opens the door to an inordinate amount of appeals to higher authorities. A clear authoritative guide to how the various interests, framed as reasons for withholding information in the OIA, diminish over time would serve to remedy this situation. Once departments can be clear on the reason why records are restricted and the principles underlying the period of restriction, the whole system will be more transparent, perceived as more legitimate, and the determination of exceptions will be far more efficient.

The problems of review may require more careful consideration of our current framework for dealing with official information. The most logical approach to relieving the Ombudsman of the current decision-making burden would be to establish an Information Commissioner. Such a commissioner would have powers of oversight of records management by departments, and the ability to review information request decisions, with the power to make binding orders. This system would concentrate experience, resources, and expertise in one authority, enabling the efficient and consistent treatment of official information issues. However, if this is considered undesirable or unworkable, the powers for review of access decisions in relation to archival material could be vested in the Chief Archivist. This would reduce the burden on the office of the Ombudsman and improve accountability. It would be a logical approach given that the Chief Archivist already oversees government record keeping and is responsible for providing guidance on making access decisions. The Chief Archivist is, in this area of expertise, obviously better placed than the Ombudsman to review access decisions.

The relatively straightforward measures suggested would serve to enhance public confidence in what is a reasonably well-regulated archival system. These practical measures would serve to improve the system without excessive interference with the current regulatory framework. The addition of new, clearer rules for access decisions, and a dedicated review authority, would work to increase the transparency of the process and the accountability of decision-makers. Most importantly they would make the system better and more efficient by clearing up significant areas of uncertainty in the current system.

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Greg Goulding - Chief Archivist and General Manager of Archives New Zealand

John Roberts - Director, Client Capability at Archives New Zealand

Stuart Strachan – Long-time archivist and member of the Archives Council

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