

Beyond openness and financial integrity: the need for a democratic assessment of local government

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Christine Cheyne
Massey University
New Zealand
C.M.Cheyne@massey.ac.nz

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Abstract

The 30th anniversary of open government legislation for local government in New Zealand in July 2017 is likely to pass largely unnoticed. New Zealand has scored favourably in rankings of transparency and corruption and it is often noted that local government in New Zealand is more subject to prescriptive transparency requirements than central government. For example, strict legislative provisions govern how local councils consult their communities and ensure that the public can attend council and committee meetings. A similar level of transparency is not applied to the Executive and to central government institutions in making their own decisions. Many are made ‘behind closed doors’ and are not subject to public consultation requirements. While there is potential for integrity breaches by either local elected members or council employees, these are rare.

Yet, changing practices around public participation and new digital technologies are generating elevated expectations and new opportunities for both transparency of, and also diminished accountability by, local government. Assessments of national integrity systems often overlook or give only limited attention to local government. In addition, it is argued that the institution of the Ombudsman which is supposed to be the guardian of open government legislation for both local and central government, needs to be reformed and to be a more effective advocate for open government at all levels. Increasingly, there is suspicion about international measures that find New Zealand to have amongst the highest levels of public sector integrity, financial accountability, and overall transparency. The paper concludes by arguing that, while international comparison is important, relevant benchmarks need to be selected and local government needs to be fully included in an assessment that encompasses not just financial systems but broader democratic processes.

Introduction

Thirty years since New Zealand's Local Government Official Information and Meetings Act ('LGOIMA') was passed in 1987, this anniversary is likely to pass unnoticed by people outside the local government other than media and a handful of scholars with an interest in freedom of information. Interestingly Wikipedia's report on New Zealand in its survey of freedom of information provisions around the world mentions only the Official Information Act 2002.¹ Yet, in the era of "fake news", the importance of such a measure should not be overlooked. Along with the Official Information Act 1982, LGOIMA arguably contributes to New Zealand's well-publicised high ranking in indices of transparency and corruption. The right to public (government) information and transparency of decision-making have become cornerstones of democratic legitimacy although they emerged at specific points in the history of those nations and states that have freedom of information legislation (Bertot *et al.* 2010). The advent of open government legislation at these different times reflected distinctive national cultures and prevailing socio-cultural conditions. For example, freedom of information has a much longer history in Nordic countries than in many Anglo Saxon countries (Götz and Marklund 2014). It is also the case that changing socio-cultural conditions and political culture also shapes the ongoing development of open government, and determines whether extension of open government progresses or stalls. Much of the literature on transparency and trust in government focuses on national governments. Yet, the degree to which local government fosters transparency and trust local government also warrants attention.

First, this paper briefly reviews New Zealand's standing in international rankings of transparency. Second, it outlines the emergence of freedom of local government information legislation in New Zealand and situates it in the broader context of local government legislation which—at least till recently—prioritises informed public participation as a key plank in the accountability of local government. Transparency and openness are central to informed participation. Despite the importance of informed participation, there are shortcomings in councils' adherence to the legislative framework (prompting complaints by citizens and the media about the lack of availability of official information). The paper explores the implications for informed public participation arising from changing practices around public participation, declining media coverage of local government, and changes to local government legislation reducing opportunities for participation. At the same time as these trends and developments are emerging, digital technologies are creating new opportunities for transparency and leading to elevated expectations by citizens of transparency (Bertot *et al.* 2010). The paper concludes that New Zealand, like many countries, needs to evolve its practices around open government and introduce some new mechanisms to address the weaknesses and limitations of current arrangements.

Transparency and open government in New Zealand

New Zealand has performed well in several international rankings of transparency and open government. The Open Budget Survey conducted by the International Budget Partnership (IBP) claims to be the world's only independent, comparable measure of budget transparency, participation, and oversight.² The methodology has evolved over time with the focus on budget documents that are

¹ See https://en.wikipedia.org/wiki/Freedom_of_information_laws_by_country#New_Zealand

² For further info see <http://www.internationalbudget.org/opening-budgets/>

published on a relevant government website as being publicly available. However, there are indicators on public participation and oversight to underscore the importance of what it regards as the three pillars of a well-functioning accountability ecosystem: budget transparency, public participation in budgeting, and the effectiveness of oversight institutions. New Zealand ranked first in the 2015 survey but there is still scope for improvement (for example, New Zealand does not have participatory budgeting) (International Budget Partnership 2015). The 2015 survey data was updated to the end of 2016 and New Zealand maintained its position through making all key central government budget documents publicly available online in a timeframe consistent with international standards. The assessment focuses on the national government's budget documents which are important for accountability but are only just one element in the accountability 'ecosystem'. A survey for assessing subnational budgets which has been administered on a couple of occasions but only to a small number of countries.³

Public trust in government (as measured by the *Transparency International Corruption Perceptions Index* (the Index).⁴ Launched in 1995, the Index is an aggregate indicator that annually ranks 168 countries by their perceived levels of corruption in the public and political sectors. New Zealand is currently ranked fourth on the Index, behind Denmark, Finland and Sweden.

In addition, Transparency International undertakes national integrity assessments measuring various indicators of transparency and governance. In a 2013 assessment New Zealand compared favourably with other countries but there were areas of weakness and risk in 2003 that had not reduced or disappeared since the previous survey in 2003. The 2013 report referred to a continuing passivity and lack of urgency about strengthening integrity:

Areas of concern, weakness, and risk do exist; for example, the relative dominance of the political executive, shortfalls in transparency in many pillars, and inadequate efforts to build proactive strategies to enhance and protect integrity in New Zealand. The pillar that raises issues of most concern is the political parties pillar. The core message of this report, therefore, is that it is beyond time to take the protection and promotion of integrity in New Zealand more seriously Transparency International New Zealand (2013, 6).

More recently, in a recent review of open government in New Zealand, Rashbrooke (2017, repeated calls from Transparency International and others for less complacency about transparency. The effect of this, he said, was that

while there may be little of the 'cash for favours' kind of corruption or rampant cronyism, New Zealand does suffer from what might be termed 'cosy-ism': a high degree of overly cosy relationships between members of a small society (Rashbrooke 2017, 6).

This meant that conflicts of interest are not dealt with well and that there is insufficient openness in decision-making.

³ In 2013, the most recent survey, the countries surveyed were Argentina, Bolivia, Brazil, Croatia, Ecuador, India, Indonesia, Mali, Mongolia and Peru.

⁴ Refer <http://www.transparency.org>.

The statutory framework for open government in local government in New Zealand

Several pieces of legislation provide the statutory framework for open government at the local level in New Zealand. The purpose of LGOIMA as set out in section 4 of the Act is to improve the availability of information (specifically, that defined as ‘official information’). This purpose (as reflected in the title) encompasses both meetings and information and is explicitly linked to improving public participation and accountability of the staff and elected members to the community:

4. The purposes of this Act are—
 - (a) to increase progressively the availability to the public of official information held by local authorities, and to promote the open and public transaction of business at meetings of local authorities, in order—
 - (i) to enable more effective participation by the public in the actions and decisions of local authorities; and
 - (ii) to promote the accountability of local authority members and officials,—

Héritier (2003, 819) argues that an emphasis on providing access to information (especially information associated with public administration

reflects the tradition of responsive democracy, developed in the 1970s and 1980s as a critique of bureaucratic/administrative behaviour, judged to be irresponsible to the needs and demands of citizens. In that earlier debate it was claimed that democracy via parliamentary representation during the input phase of policymaking was not sufficient to bring about democracy. Consequently, decisionmakers should also be held accountable and be responsive to the wishes of citizens during the output phase of policy-making administrative behaviour. A variety of institutions, particularly at the local level, such as citizens’ information offices, interest groups or citizens’ watchdog bodies, were developed in order to allow citizens and associations to exert influence on administrative behaviour.

According to Hazell and Worthy (2010, 352) in the two decades from the late 1980s freedom of information legislation “moved from being a legislative ‘luxury’ enjoyed by a few advanced democracies to becoming an accepted part of the democratic landscape”. By mid-2016, over one hundred national governments had passed access to information laws (and laws have also been passed by many subnational governments (Mendel 2016, Hazell and Worthy 2010, Ball 2009).

New Zealand’s legislation was passed five years after the Official Information Act 1982 introduced access to information to central government and was closely followed on the earlier statute. It applies not just to regional councils, territorial authorities, local boards and community boards, but to a range of other subnational governing bodies (including university councils, district health boards, airport authorities and a large number of public trusts and boards. The 1987 legislation had been preceded not just by the Official Information Act 1982 but also by the Public Bodies Meetings Act 1962 (coverage of which extended to council committees following an amendment in 1975) but Bush (1995, 81) argues that “the spirit of the law was persistently flouted”. As with the Official Information Act, there is a presumption of openness of meetings and availability of information. Part 5 of LGOIMA set out the

principle of availability which states that Information must be made available unless there is good reason for withholding it.

There are clear statutory grounds for meeting with the public and press excluded and for withholding information. These grounds include the need for commercial sensitivity, protecting the privacy of individuals, to allow for free and frank expression of opinions by or between or to members or officers or employees of a local authority. Commercial sensitivity is widely used to withhold information and this is a particular concern given the extent to which local government services and significant infrastructure assets are managed by arm's length entities, called Council Controlled Organisations (CCOs) which are not subject to the same requirements for public access to meetings. Without public meetings, much business is conducted out of the eye of the public and the media, and often information is deemed commercially sensitive as CCOs operate according to commercial principles. Denial of a request for access to information can be appealed to the Ombudsman, an independent officer of Parliament.

The provisions in LGOIMA are reinforced by governance principles in the main local government statute, the Local Government Act (LGA) 2002. Public participation and accountability of councils to communities are key themes in this statute. Indeed, informed public participation is a key plank in accountability. Section 14 of the LGA 2002 outlines principles underpinning local government which highlight the importance of openness, transparency, accountability:

- (1) In performing its role, a local authority must act in accordance with the following principles:
 - (a) a local authority should—
 - (i) conduct its business in an open, transparent, and democratically accountable manner; and
 - (ii) give effect to its identified priorities and desired outcomes in an efficient and effective manner;
 - (b) a local authority should make itself aware of, and should have regard to, the views of all of its communities; and
 - (c) when making a decision, a local authority should take account of—
 - (i) the diversity of the community, and the community's interests, within its district or region; and
 - (ii) the interests of future as well as current communities; and
 - (iii) the likely impact of any decision on the interests referred to in subparagraphs (i) and (ii):
 - (d) a local authority should provide opportunities for Māori to contribute to its decision-making processes...

Part 6 of the LGA 2002 contains a number of provisions related to planning, decision-making and accountability. Each of these aspects of local government encompass mechanisms that ensure information is able to be accessed by citizens and communities about a council's planned activities. Provisions for consultation outline the content of annual and long-term plans and ensure citizens' views can be expressed and incorporated into decisions. There is a requirement for councils to adopt a Significance and Engagement policy and also a requirement for the long-term plan to contain a

report from the Auditor-General on whether the plan is fit-for-purpose and on the quality of the information and assumptions underlying the forecast information provided in the plan. Section 93 explicitly refers to the role of the long-term plan in providing a basis for accountability of the council to the community. In addition, there are numerous provisions designed to ensure transparency of council decisions in relation to financial management.

To summarise, LGOIMA contains many similar provisions relating to official information that apply to central government. In addition, it has provisions oriented toward the particular functions of local government and is supported by various provisions in other statutes, most importantly the LGA 2002. A major thrust of the LGA 2002 is to promote accountability. This is achieved through transparency and also opportunities for citizens to give feedback on draft plans and policies. Section 82 contains a set of consultation principles that emphasise the need for user-friendly information to be provided and for citizens to receive feedback on submissions.

Trends in openness and transparency in local government in New Zealand

There are significant citizen and media concerns about lack of openness and transparency in Local government. In its 2016 annual report, the Office of the Ombudsman indicated that it had received a high number of complaints in the 2015/16 financial year and it expected the high rate of complaints to continue. Over half (56%) of all official information complaints received concerned the partial or outright refusal of requests for official information, and 23% concerned delays by agencies in making decisions on official information requests or in releasing information. Reasons for the refusal of requests for official information are not given in the report. In the Wellington City Council example referred to above, lack of staff was cited with workloads having increased following the November 2016 earthquake. Rather than simply reacting to complaints, the Ombudsman has said he intends to undertake proactive investigations into agencies' responses to official information requests, focusing on agencies which have a high number of delayed responses. Amendments to the LGA 2002 in the 15 years have made some significant changes to key aspects of the Act related to public participation in the annual plan and long term planning processes, as well as to consultation more broadly. The intention of the government has been to streamline planning processes but the effect has also been to reduce some opportunities for citizens to contribute to decision-making. For example, in 2012 the requirement for councils to undertake a community outcomes process was removed. Similarly, the requirement to use the special consultative procedure when consulting on the draft long-term plan has been removed. Changes have also been made to the content of the consultation draft of the annual plan and long-term plan.

These changes have occurred in a context where rapid technological change is having a profound effect on modes of communication and political participation. Moreover, New Zealand society is becoming increasingly ethnically diverse as a result of record high levels of immigration but inequalities are also becoming more entrenched. These social, economic and technological changes present new challenges for councils when engaging with communities.

Despite the legislative guarantee of openness and availability (other than when not required for prescribed reasons), there are deficiencies in citizens' access to information and meetings. Dissemination of information about meetings and the business being conducted requires familiarity with council processes and with council websites. The latter are increasingly relied on for public notices and for providing access to agendas, reports and minutes. Those without knowledge of these

processes or without access to the necessary technology will find it difficult to access information or to know when meetings are held. For people whose first language is not English there may be barriers. New Zealand Sign Language is an official language as is Māori but there are few materials made available in languages other than English. A lack of understanding of government process is a key impediment to participation, and without access to information participation is unlikely to be effective (Cheyne 2016).

The time of day at which meetings are held can be a barrier to participation, especially for those who have paid and/or unpaid work commitments. Distance from council meeting venues is another barrier to accessing meetings and information. A number of councils provide live streaming but this is not done consistently and when it is done it is only for council meetings and not council committee meetings.

A further impediment to informed public participation is the rapidly diminishing coverage of civic affairs by mainstream print media. While this media coverage has not been widely utilised by many groups in the population (in particular, young people) it nevertheless has been increasingly linked with online media content. However, changes in the ownership structure and business model of commercial news media are resulting in more restrictions on online content as well as reduced print content (Rankin and Cheyne 2016).

The lack of capacity in news media for reporting of civic affairs is compounded by weaknesses in the official information legislation. Sir Geoffrey Palmer, a highly respected constitutional lawyer and former Prime Minister, argues that the principles underpinning open government legislation are sound but implementation at times is poor. In particular, government attitudes to official information are hampering democratic debate and accountability. He notes that the international lobby group Reporters without Borders downgraded New Zealand's press freedom ranking from 5th in 2016 to 13th in the 2017 World Press Freedom Index in part because of government practices in delaying and charging for responses to requests for information (Palmer 2017). For example, recently the Ombudsman, the independent watchdog that investigates complaints about councils' response to LGOIMA requests, instructed the mayor of Wellington City Council to review the council's handling of LGOIMA requests. Palmer advocates reforms as recommended by two Law Commission reviews of the Law Commission. The 2012 report, *The Public's Right to Know*, contained a number of recommendations, and drew particular attention to the need for oversight of implementation of the legislation which it said may be even greater in relation to local government than central government because of its highly individualized character. For this reason, the Law Commission recommended an oversight office to monitor both central and local government. In the meantime, it also encourages reporting by the Ombudsmen to publicise complaints it receives about lack of responses by government agencies to official information requests (Law Commission 2012).⁵

Overcoming the accountability deficit: beyond 'democracy as disclosure'

Transparency is clearly linked to the accountability deficit that new public management (underpinned by neo-liberalism) sought to address. However, both accountability and transparency are more

⁵ The website of the office of the Ombudsman provides citizens with a template for making official information requests and also a calculator to determine the timeframe for the response.

complex that simplistic consumerist approaches suggest. The term transparency has somewhat varied meanings. According to Transparency International New Zealand (2013, 22) it encompasses:

accessibility to the public of information the state and other institutions hold, particularly about their decisions and actions. Transparency is justified both on the basis of its intrinsic merit and because of its instrumental value, that is, its contribution to more effective, efficient, and equitable governance. Citizens have a right to information, as established, for instance, in the International Covenant on Civil and Political Rights ...

Transparency has typically been surrounded by controversy, giving rise to the so-called 'transparency paradox' (Bernstein 2012), referring to recognition that openness can, perversely, decrease trust in politics by exposing misconduct by politicians and officials. What also is now increasingly understood is that transparency is not a sufficient condition for overcoming the accountability deficit. It is, as Haque (2000, 2001) argues, about putting the publicness back into public service. This demands a broader assessment of a range of dimensions of integrity: in essence, a democratic assessment tool. This encompasses not just the extent of transparency but the quality of public participation – at both national and local levels. The latter is particularly important.

While there are many similarities in the open government statutes for local and central government local government also has specific features associated with its proximity to citizens and statutory arrangements for planning and accountability. Transparency about proposed activities and consultation, if not participation, in planning processes are key elements in these arrangements.

But after thirty years (and more) of open government legislation, transparency policies need to evolve. As Fung *et al.* (2007, 6) argue:

Transparency systems always begin as imperfect compromises and must improve to keep pace with changing markets, advancing science and technology, and new political priorities.

Rashbrooke (2017, 6) argues that while digital technologies have provided new opportunities for citizens and governors to interact, the focus has been on the use of technology for transactional government services rather than creating space for democratic online engagement. Many democratic innovations now used successfully in other parts of the world (such as participatory budgeting) could be considered and adapted for use in New Zealand. Participatory budgeting would go well beyond the limited scope given to communities to have input into councils' annual budgets. It is seen as offering potential to enhance both democratic accountability and effective city management through transparency (Brun-Martos and Lapsley 2017). As well political culture needs to be transformed with stronger checks and balances on the dominance of the national government as recommended by Transparency International and others (see, for example, Wearne 2014, New Zealand Productivity Commission 2013).

Transparency and extensive and robust community engagement can be uncomfortable for politicians. However as Rourke (1960, 691) acknowledged:

Nothing could be more axiomatic for a democracy than the principle of exposing the processes of government to relentless public criticism and scrutiny.

New technologies that were unknown when Rourke was writing make this more necessary than previously—and more feasible. Yet, many innovations have emerged – including various institutions at the local level – to allow citizens to exert influence on politicians and officials. While international rankings have their place, they have, arguably, allowed New Zealand to be even more complacent than it might be about its performance. Rather than assisting those at the top to aspire to outdo themselves, they can deflect attention away from the deficiencies of those scoring well to the underperformers. Finally, analysis of public policies underpinning open and transparent government must be informed by theoretical influences, most notably the shortcomings of neoliberal prescriptions for public participation and democratic accountability.

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