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Editorial:

Good decision-making processes

Many of the complaints we receive turn effectively on dissatisfaction with the processes followed by public sector agencies in making decisions or recommendations that affect individuals. In particular, we receive complaints directed at two distinct phases:

- The processes leading up to the making of a decision or recommendation in which the complainant has an interest or may be affected by the outcome; and
- Processes after decisions or recommendations are made.

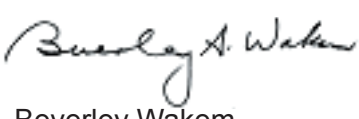
An issue that often arises in complaints about pre-decision processes is whether there was adequate consultation with parties that were likely to be affected by or otherwise had a legitimate interest in the outcome. This can encompass complaints about not being given access to relevant information as well as complaints about not being given sufficient time to respond to consultation. The integrity of a decision or recommendation may be undermined if parties with a valid interest in the outcome are not given an adequate opportunity to comment in circumstances where there is reasonable expectation of such opportunity.

Issues which can arise after a decision or recommendation is made include the reasonableness of any delays in implementing the decision or recommendation, the adequacy of reasons given for a decision or recommendation and the adequacy of processes for handling complaints received about the decision or recommendation.

In this OQR, we examine several of these issues in the context of complaints we have received over the past few months which suggest that some agencies may need to review their existing processes and their staff's knowledge of them.

Good processes do not necessarily guarantee good decision-making in all cases, but they increase the likelihood. However, the effectiveness of good processes depends critically on adequate staff training in how to apply them and regular review to update and remedy any deficiencies which are identified in specific cases. This requires a conscious and consistent effort by agencies at all levels from senior management to junior staff.

John Belgrave
Chief Ombudsman



Beverley Wakem
Ombudsman

Releasing identity of requesters when consulting third parties

WE have received several informal enquiries recently from agencies asking whether they are able to advise third parties of the identity of a requester when consulting about the potential release of official information in response to a request under the OIA.

The usual purpose of consulting third parties is to obtain their views on whether they have any particular concerns with release that an agency has not already identified or confirm whether the appropriate weight to concerns has been given. The identity of the requester seeking the information at issue may well be relevant to whether the third parties have any concerns about disclosure.

Therefore, as a general rule of thumb, it is the Ombudsmen's view that advising third parties of the identity of the requester is appropriate and often necessary to ensure that informed consultation takes place. As a matter of good practice, the agency should advise the requester at the time of the request of the possibility that their identity may be disclosed if consultation is necessary.

If the identity of the requester is withheld from the third parties to whom the information requested relates, then there is a risk that the agency's final decision will not be based on all the relevant information it should have had available to it.

If a requester asks an agency not to disclose his or her identity to the third party to whom the information requested relates, then the agency should consider whether there is any reasonable basis for withholding it.

In any such consideration, an agency should ask itself whether, if the third party asked for the identity of the requester, there would be any reason for refusal under the OIA. If no such reason exists, then the identity should not be withheld.

CHECKLIST

For agencies consulting with third parties when considering requests for information that relates to or may otherwise affect those parties:

As a general rule of thumb, the following information should be provided to third parties when they are consulted about possible release of information requested that relates to them -

- Nature of the request (as relevant to third party);
- Unless there is good reason otherwise, identity of requester;
- A brief description of the information held by the agency that is captured by the request and is considered relevant to the third party;
- Advice that the guiding principle under the OIA is to make available the information requested unless there is good reason under the OIA to refuse to do so;
- Request for advice as to whether they have any concerns about release of the information (and if so, what and why) or confirmation that they have no such concerns;
- Due date to enable timely response by agency;
- Where relevant, comment on public interest considerations involved;
- Explanation that while what they say would be helpful they cannot veto release under the OIA where there is no good reason for refusal.

Defer final decision until Ombudsman investigates

IN a number of recent cases, requesters have asked public sector organisations for information to enable them to make submissions on certain proposals about which decisions were pending. The requests were refused and reviews by an Ombudsman were sought. In each case, there was insufficient time for the Ombudsman to complete his enquiries before the date for submissions closed.

One of the purposes of the Official Information Act is to increase the availability of information in order to enable the effective participation of the people of New Zealand "*in the making and administration of law and policies*". Ensuring adequate information is available to parties wishing to make informed submissions would meet this purpose and ultimately enhance the decision or policy-making process.

However, an Ombudsman does not have power to halt or suspend a decision or policy-making process. Rather that remains the prerogative of the organisation to decide upon in the circumstances of the case. Given the purposes of the OIA, the Ombudsmen's general practice has been to ask organisations to consider postponing the deadline for receipt of submissions pending the outcome of an investigation so that it can be established whether the complainants have received all the relevant information they are entitled to.

If the agency declines to postpone the deadline and the Ombudsman subsequently finds that further information ought to have been made available, it would be open to the requester to then complain under the Ombudsmen Act that they were prejudiced from making informed submissions. In such circumstances, it is likely that the Ombudsman would find that the organisation had acted unreasonably in terms of the Ombudsmen Act. One possible outcome resulting from such a finding is that the agency may be required to start the process over again.

It would therefore be good administrative practice for public sector organisations to consider carefully whether they should defer making final decisions until an Ombudsman's investigation in such circumstances is completed.

FOI news around the World

Access to information improves Britons' confidence in their Government
A UK study indicates 72% of people have more confidence in public authorities because of the Freedom of Information Act, while 76% believe the Act has increased their knowledge of public authorities and 82% of public authorities themselves believe the Act is needed.
http://tinyurl.com/rgeyt and http://tinyurl.com/o2btl

Hungary discloses NATO Agreement about restricting access to information
The Hungarian government recently disclosed the NATO Agreement to Safeguard Security Information within the respective countries information disclosure regimes in response to an FOI request in that country. Canada, the United Kingdom and the USA had previously refused to disclose the agreement in their own countries.
http://tinyurl.com/p5jw6

USA may adopt Ombudsman review of requests for information
A Bill aimed at improving the operation of the US Freedom of Information Act recently received unanimous bipartisan support in the Senate Judiciary Committee. In addition to strengthening reporting requirements on federal agencies on the operation of the law, the Bill also proposes the creation of an FOI ombudsman to review agencies' compliance with the law and to provide alternatives to litigation (US access to information appeals are mostly heard in the courts). http://tinyurl.com/qpoln

Access to information law generates news
The Campaign for Freedom of Information has published a compendium of 500 British news stories that resulted from disclosures under the UK FOI Act. http://tinyurl.com/oon3d [PDF]

USA spends over $9.2 billion restricting access to information
The Information Security Oversight Office reported the annual cost of restricting access to information in the interests of national security as US$9.2 billion (NZ$13.9bn). This figure does not include the CIA's estimates for the cost of classifying information in the national security as the CIA classified this information.
http://tinyurl.com/z9fol

'Right to Know Day'
Organisations in 30 countries celebrated 'Right to Know Day' on 28 September, with many activities designed to highlight the achievements and importance of freedom of information laws. Details of the activities can be found here: http://foiadvocates.net/map2006.php and Canada's Newspaper Association has conducted an FOI 'audit' which tested access to information systems in 10 Canadian provinces as part of a national 'Right to Know Week'.
http://tinyurl.com/nuwke & http://tinyurl.com/epupp

World Bank adopts new anti-corruption strategy
The World Bank has approved a strategy aimed at 'Strengthening Bank Group Engagement on Governance and Anticorruption' which contains several recommendations on improving openness and transparency in developing nations to improve standards of governance. http://tinyurl.com/g82tw

Managed release of information vs undue delay

SECTION 15 of the OIA requires that the decision on whether a request for access to specified information is to be granted must be made and the requester advised "*as soon as reasonably practicable and in any case not later than 20 working days after the day on which the request is received*". However, from time to time, public sector agencies and Ministers may decide to make a general release of information on a particular matter. Although there is nothing in the OIA preventing such a general release of information, agencies and Ministers are obliged to address specific requests and respond directly to the requester as required by section 15.

Further, while the Act is also silent on when any requested information itself must be made available, section 28(5) of the Act provides that any "undue delay" in making official information available in response to a particular request shall be deemed a refusal under the Act and therefore subject to review by the Ombudsman.

It is accepted that in some cases there may well be some delay between a decision that certain information can be released and the administrative action in collating the information and preparing it for dispatch. In such cases, the delay may be reasonable in administrative terms and certainly not "undue". However, in other cases, delay in making information available has seemed to turn more on administrative convenience rather than administrative necessity.

Recently, the Ombudsmen have considered complaints from requesters who have experienced delays in receiving the information they had asked for in circumstances where the public sector agencies involved had already decided to make the information available but wished to manage the release of it either by arranging a general release of the information such as placing it on their website, or providing it to other interested parties such as media organisations, even though they may not have requested it.

In one case, the information was released to a media organisation who had not requested the day before the requester received it. On the face of it, if it is possible for a public sector agency holding requested information to dispatch it to a party who has not requested it on a certain day, it seems unlikely that there should be any difficulty in making the information also available to the requester on that same day.

In another case, the requester received the information on the same day as it was released to the general public. The requester argued that as they had asked for it first, they should receive it first. However, there is nothing in the Act that says that an organisation can't release the information to the general public. Rather, the organisation does have an obligation to release the information without undue delay to the requester once it has determined there is no good reason under the Act for withholding it. If release to a requester happens to coincide with general release, that alone is not enough to constitute undue delay.

It is therefore good administrative practice for an agency having made a decision to grant a request, albeit in conjunction with a general release of information, to endeavour to make the information available straight away and confirm to the requester whether that general release includes all the information covered by their specific request. If not, requesters must be advised of their right to an investigation and review of the decision in relation to their specific request under the Official Information Act.