Volume 13, Issue 1. March 2007
ISSN 1173-5376

Editorial:

Proactive release and good administration - making the task easier

Advances in technology over the last decade in particular have resulted in more information being held by public sector agencies rather than less. This in turn has placed greater administrative pressure on agencies in responding to requests under the OIA and LGOIMA. While in theory electronic records may be easier to retrieve than paper records, in reality the volume of electronic records tends to be greater and ease of retrieval depends on how they are stored.

A major concern of many agencies facing broadly framed requests for information relating to a particular policy or decision making process is that the sheer volume of information covered by such requests threatens to overwhelm the agency's administrative capacity to respond adequately. One proven tool for better managing this situation is for agencies to plan proactive release of relevant information throughout the process. One of the benefits of technology is that it is much easier to proactively release much information electronically via an agency's website so that it is available to whoever may want it without the agency having to guess who may be interested.

One advantage of proactive release is that a large volume of information that may otherwise have to be collated and duplicated for individual requests will already be publicly available and therefore requires no further administrative effort.

Another advantage of proactive release can arise in cases where agencies believe that some information may need to be withheld to avoid damage to interests protected under the OIA and LGOIMA. When considering whether there is a stronger public interest in disclosure of such information it is often critical to identify what other relevant information is already publicly available. If there has already been significant proactive release which substantially meets any concerns about accountability and adequate participation then the review process is often much more straightforward.

Some agencies already use proactive release successfully as part of their wider information management strategies. In several overseas Freedom of Information jurisdictions there is a statutory obligation to proactively release certain types of information. While there is no obligation in New Zealand to consider proactive release, conventional wisdom suggests that agencies that do not do so risk ignoring best practice and setting themselves and their staff up for unnecessary stress and "compliance costs". As a matter of good administrative practice, considering where proactive release policies would assist and implementing them would seem the smarter way to move.

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The OIA does not prohibit the release of Official Information

WHILE the OIA outlines the circumstances in which a request may be refused, it would be patently contrary to the intent of the OIA to prohibit the release of information. Thus, while section 12 of the Act restricts the right of persons to request official information, any person lacking this right can still, outside of the provisions of that Act, make a request for information and receive it.

A person living overseas recently requested official information from an organisation and was refused it solely because he did not meet the conditions of section 12. This provision restricts the right to *request* official information to a New Zealand citizen, a permanent resident of New Zealand, a person who is in New Zealand, a body corporate incorporated in New Zealand, or a body corporate incorporated outside New Zealand but having a place of business in New Zealand.

In the days of the Official Secrets Act, and long before the advent of the Official Information Act, people (including people overseas) would request information from Ministers, government departments and organisations and they would duly receive it (or not as the case may be). Even today, information is released outside of the ambit of the OIA, most notably by means of a press statement or what is termed the "proactive" release of information such as the posting of Cabinet papers on Ministers' websites.

The Ombudsman investigated this particular complaint under the Ombudsmen Act, which is how complaints about the refusal of information requests - pre- the OIA - were handled.

The Ombudsman therefore indicated to the organisation that his investigation would examine whether the organisation's decision to refuse the request was "reasonable" in terms of section 22(1) of the OA. His starting point would be whether the organisation could properly refuse the same request if it had received it from a person who was entitled, in terms of section 12 of the OIA, to request it.

Following notification, the organisation promptly released the information to the requester, thus removing the need for further investigation.

The transfer of OIA requests: a subjective test

UNDER the OIA, the agency that receives a request for official information must make a decision on that request unless it is transferred in accordance with s14 of the Act. Section 14 obliges an agency to transfer a request where the information to which it relates:

- is not held by the agency but is believed by the person dealing with the request to be held by another agency or Minister; or

- is believed by the person dealing with the request to be more closely connected with the functions of another agency or Minister.

A previous edition of the OQR (Volume10, Issue 1) explained that while the decision to transfer an OIA request cannot be investigated by the Ombudsman under the OIA, it can be the subject of an investigation under the Ombudsmen Act. When investigating such a decision, the Ombudsman will consider whether either of the circumstances in s14 is made out.

Having said that, it is important to remember that the test in s14 is subjective, depending as it does on the belief of "*the person dealing with the request*". Hence, the decision to transfer an OIA request will not normally be questioned if it is established that the person dealing with the request had a genuine and honest belief that the requested information was held by, or more closely connected with the functions of, another agency or Minister. An Ombudsman would most likely investigate further only if the belief was based on a mistake of law or fact (s22(1)(c) Ombudsmen Act refers), or there was otherwise no reasonable basis for such a belief.

"Should they stay or should they go" - complaints about trees

FROM time to time the Ombudsmen are asked to intervene in disputes where residents differ with the decision of a local authority to remove or retain prominent trees on Council-owned land. While the Ombudsmen have a jurisdiction to investigate the decisions of Council officers, committees and members (other than a full Council), it will usually be appropriate for the final decision on such matters to be made at the local level. A judgement on whether a tree may be in a dangerous condition, or is suited to its location, is best made by a qualified arborist, and a judgement on whether the adverse effects of a tree on a resident's enjoyment of his or her property outweigh the benefits of the tree to the wider community is best made by the local community and/or its elected representatives.

The Ombudsmen will, of course, intervene where there is evidence that adequate procedures may not have been followed when the decision was taken. However, provided the final decision is one that is reasonably open to the Council to reach, on the facts before it, it is likely the Ombudsmen will express no opinion on whether the trees in question should remain.

Information held by a Minister but not in that capacity

TWO recent OIA complaints against the Prime Minister highlighted the relevance of an earlier *Review* item (Vol 2 Issue 4, December 1996) explaining that while information held by a Minister of the Crown in that official capacity is "official information" (see section 2 of the Act), information held by a Minister in any other capacity is not.

A Prime Minister may hold official information in their official capacity as Prime Minister alongside any other ministerial responsibility. However, information held as leader or member of their party, as a Member of Parliament or in their private capacity is not official information. An Ombudsman must form a view on the information at issue in terms of its nature, content and purpose, the context in which it came to be held and the use to which it has been put.

In the first case the information, which had not been generated within executive government, could be characterised as "political intelligence" held by Miss Clark relating to matters for which neither she as Prime Minister nor any other Minister had any ministerial responsibility. She had seen it in her capacity as Leader of the Labour Party.

Reference to the information was made by her in response to a question in the House. Participation in Parliamentary proceedings is the function solely of Members of Parliament (who are not subject to the OIA) and is not an executive function. Accordingly, Miss Clark's reference to the information was in her capacity as a Member of Parliament. Consequently the information did not thereby become "official information".

In the second case the information related to the 2005 parliamentary elections. The information came to Miss Clark from the Clerk of the Executive Council, a position held concurrently with that of Secretary of the Cabinet.

During a government formation process, the Clerk provides official, impartial support to the Governor-General, including facilitating the transition between administrations (in particular, assisting the outgoing and incoming Prime Ministers if there is a change of government). Consistent with this, the Clerk's advice on constitutional matters is available on an even-handed basis to the leader of any party (including the incumbent Prime Minister) involved in an attempt to form a government after an election.

Having regard to the foregoing and to the overall content and context (including timing) of the Clerk's advice in this case, it was considered that Miss Clark received that advice as Leader of the Labour Party rather than as "a Minister of the Crown in [her] official capacity" and that it was therefore not, in her hands, 'official information'. This being so, it was concluded by the Ombudsman that the OIA did not apply.

Request for access to a website

IN a recent case, the complainant requested and was denied access under the OIA to a password protected website run by the Ministry of Education. The website enables each state or state integrated school access to a range of data and reports in respect of that school. The complainant was effectively using the OIA as a means of trying to open the website up for ongoing public access.

The Ombudsman concluded that this complaint would have to be investigated under the Ombudsmen Act, not the OIA.

An Ombudsman's function under the OIA is to investigate and review complaints about decisions made on requests for "*official information*". To be "*official information*", the information must be "*held*" and, given the wording of s12 of the OIA, must also be capable of being specified with "*due particularity*". In other words, the information must already be in existence and identifiable.

Access to a website, on the other hand, is access to a facility that enables the viewer to select, on an ongoing basis, whatever information may, for the time being, be loaded on that site. A request for such access is therefore a standing request for an undetermined range of both existing and future information that may at some time become available on that site. Such a request extends beyond the scope of the OIA.

The Ombudsman is continuing to investigate the reasonableness of the Ministry's decision not to allow open and ongoing public access to the website under the Ombudsmen Act. We will report on the outcome of this investigation in a future issue of OQR.

Disseminating the outcomes of Ombudsmen's investigations

AN immigration agent recently raised the issue of whether, and if so, to what extent, the outcomes of investigations conducted by the Ombudsmen into complaints against Immigration New Zealand ("INZ") are made known within INZ.

Inquiries in this regard established that INZ has taken steps to ensure that relevant managers are apprised of issues of general application arising from investigations under the Ombudsmen Act and the Official Information Act, through, for instance, memoranda and Internal Administration Circulars (IACs). INZ also indicated that the dissemination of such information has been accorded priority in the 2006-2007 financial year.

These initiatives can only serve to improve INZ's responsiveness to its clients, and the Department of Labour is to be commended for having taken such steps. Other organisations subject to the Ombudsmen's jurisdiction which have not already implemented such arrangements are encouraged to do so.

FOI news around the World

Inter-American Court of Human Rights recognises a general human right of access to government held information

The Inter-American Court of Human Rights has affirmed that there is a general right of access to information held by government. This is the first such ruling from an international tribunal. The Inter-American Court, in its ruling on 11 October 2006 in the case of *Claude Reyes and others vs. Chile*, found that Chile had violated the right to information both by not providing information in response to a specific request for information by three environmental activists in 1998, and also by not having a law and other effective mechanisms to guarantee the right of all persons to request and receive information held by government bodies. The Court ordered Chile to release the information requested and to give reasons for any information not released. It also required Chile to adopt legal and other measures "*to guarantee the effectiveness of an adequate administrative process for dealing with requests for information, which sets deadlines for providing the information*" and instructed the Chilean State to train its public officials on the right to information and international standards on exemptions. An English summary of key paragraphs of the judgement is available:
http://tinyurl.com/sckry [Word.DOC file]

US Court sets precedent for public interest fee waiver

The US federal FOI Act expressly requires agencies to grant a public interest fee waiver if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and is not primarily in the commercial interest of the requester". A recent judgement from the Washington DC District Court has clarified that an organisation's dissemination of free educational materials on a publicly available website, participation in conferences and workshops, and publication of 'action alerts' are all actions that can merit a FOIA public interest fee waiver. The judgement is available from:
http://tinyurl.com/yz778f [PDF]

Freedom of information celebrates 240th Birthday

The world's first access to government information law was enacted in Sweden on 2 December 1766. To celebrate the 240th anniversary of this step forward in human rights the Anders Chydenius Foundation has published an English translation of the original law and some other articles on FOI today. The festschrift is available to download from: http://tinyurl.com/ylj7nh