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Editorial

STRAINING THE OFFICIAL INFORMATION ACT BOUNDARIES

If the Official Information legislation is pushed beyond its administrative limits, by either requesters or holders of information, there is a real risk that it will be rendered unworkable or its purposes not achieved.

Agencies holding official information need adequate resources and training to meet their obligations under the legislation's framework.

But recently there has been a trend to an increase in the use of broadly defined requests, seeking access to official information. This appears to be causing administrative problems for Ministers, Departments and organisations subject to the Official Information legislation in both:

- identifying precisely what information is being sought, and
- physically compiling the information covered by a request so that it can be reviewed and a decision made on whether or not access should be granted.

The official information legislation does not specifically bar a request for a large amount of information or defining the parameters of a particular request in broad terms. However, the overall scheme of the legislation recognises that there be a balance between promoting readier access to official information and recognition of the administrative cost in time, labour and materials of that access.

Requests framed along the lines of "*please provide me with copies of all reports, Cabinet papers, briefs, notes, minutes, correspondence, e-mails and all other information...*" would, if unchecked, have the capacity to overwhelm the ability of public sector agencies to cope with the administrative consequences.

The legislation does, however, contain administrative mechanisms (for example sections 12-19 of the Official Information Act) which assist in striking a reasonable balance between "*the need for readier access*" and "*the price of that access*". In the body of this issue of we discuss in more detail the nature of these mechanisms and how they operate.

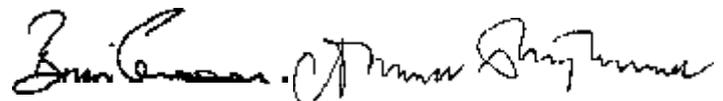
Notwithstanding these mechanisms within the legislation, many public sector agencies are finding it difficult to process in a timely manner the requests they receive, particularly those requests that are broadly framed and cover a large amount of information. In our view, although some legislative fine-tuning along the lines recommended recently by the Law Commission in its report "*Review of the Official Information Act,*" Report 40, October 1997, would assist, the current difficulties experienced by agencies processing requests are not due to defects in the legislation.

In our investigations and reviews relating to large and broadly defined requests, we have found that there is a basic lack of understanding and adequate training about the practical operation of the legislation. This factor, perhaps more than any other, has contributed to an increased pressure on the limited administrative resources of some agencies subject to the Official Information Act for processing official information requests.

If that pressure becomes too great then there may be a danger that:

- valid requests may, because of administrative overload, not receive proper or timely consideration;
- the processing of requests may become unreasonably slow and prone to arbitrary delay; and
- the fundamental purposes of the legislation will be undermined.

For any of those consequences to emerge would be regrettable and steps should be taken to see they do not happen. Both requesters and holders of official information can help by increasing their understanding of how the legislation operates and the factors which must be balanced when it is used to gain access to official information. This Ombudsman Quarterly Review is devoted to these matters and hopefully will be a useful resource for those involved in the use of the Official Information legislation as either requester for or holder of information.



Sir Brian Elwood
Chief Ombudsman

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LARGE AND BROADLY DEFINED REQUESTS FOR

Effectively, the Official Information Act sets up a framework which allows a balance to be struck between:

- (a) the principle of availability of official information and the purpose “to increase progressively the availability” of that information to enable more efficient public participation in the making and administration of laws and policies; to promote the accountability of Ministers and officials; thereby promoting good government and respect for the law; and
- (b) the protection of official information consistent with the public interest.

Between these parameters of availability and protection, there is an inevitable tension.

That tension can be managed by reference to the Act. Checklists for requesters and holders of official information are set out in this Issue.

Large and broadly defined requests have caused the greatest difficulty in managing the tension.

The Act does not specifically bar a requester from seeking a large amount of information or from defining the parameters of a particular request in broad terms. However, although the Act does not expressly preclude “fishing expeditions”, the supplementary report of the Danks Committee on Official Information (“Towards Open Government” 1981 at p.69) notes as follows:

“It is not envisaged that individuals should have a right to conduct ‘fishing expeditions’ in the hope or expectation that material of interest or use will turn up, or to make vague or sweeping requests for a class of information.”

At pp. 31 and 32 of its supplementary report the Danks Committee commented as follows:

“4.39 The granting of access to official information, even information which of its nature clearly need not be withheld, cannot be an absolute priority to which all other functions of administration must yield. Especially in times of financial and staff restraints on government activities, some limitation of the resources available for providing information to members of the public is inevitable.”

4.40 It is evident that there is a price to pay for provision of more ready access to official information. A balance will in the end have to be struck between the need for readier access, which this Committee endorses, and the price of that access. Manpower resources (particularly at the senior levels where the essential decisions will have to be made) as well as financial considerations will need constant assessment before the correct balance between the price and the need can be struck. This is not an argument of ‘administrative convenience’; still less ought it to be used as an excuse for withholding information that is awkward or embarrassing.”

These comments remain relevant today, particularly in the context of large and broadly defined requests.

The starting point for an agency receiving a request is to consider whether it can identify the information being sought. Section 12(2) requires that “*the official information requested shall be specified with due particularity in the request*”. In its Supplementary Report the Danks Committee explained, on page 31 at paragraph 4.38, that by “specified with due particularity” it meant that the information should be “defined sufficiently specifically for an experienced officer to identify it”. Therefore the issue under section 12(2) is not whether a request is broadly framed and potentially covers a large quantity of information but whether an experienced officer (in the Office or Department that holds the information) can identify the information requested. That will be a matter of fact in each case.

However, the requirement on requesters under section 12(2) is balanced by an equal duty under section 13 on every Department, Minister of the Crown and organisation to give “reasonable assistance” to a requester to make the request in a manner that is in accordance with section 12 of the Act.

As we have noted in our Practice Guideline No.1, reasonable assistance, for the purposes of section 13, requires more than stating that the request is not specific enough. In many cases, requesters simply may not have sufficient knowledge of the precise nature of the information they are seeking, or the form in which it may be held, to allow them to be more specific.

OFFICIAL INFORMATION CAUSING PROBLEMS

The best method for providing assistance may be for the agency receiving the request to enter into dialogue with the requester to see if clarification can be provided. Such dialogue may also identify appropriate cases for transfer of a request to another agency where it becomes clear that the information being sought is either held by or is more closely connected to the functions of another agency subject to the Act (section 14).

However, even where a request is narrowed down as far as possible, it may still cover a large volume of information. In these circumstances, the information holder may need to consider extending the maximum time limit for response under section 15A to allow reasonably for the time needed to review properly all the information at issue and assess whether any of it requires valid protection. Moreover, if substantial staff time and photocopying is required to make available large volumes of information, reasonable charges may be imposed, depending on the circumstances of the case.

As an alternative to extending time limits or fixing charges, consideration may be given in appropriate circumstances to alternative forms of disclosure under section 16 (release of summaries or excerpts, oral briefings) which may avoid the need to peruse large volumes of information.

If none of these other mechanisms provide a reasonable basis for managing the administrative burden of processing large or broadly defined requests, then refusal under section 18(f) may be justified.

Section 18(f) is primarily focussed on the administrative task of identifying what information falls within the scope of a particular request and assembling it for consideration as to release. At paragraph 4.38(4) on p.31 of its supplementary report, the Danks Committee noted that "a person requesting information is not entitled to ask a department to assemble or analyse data for him".

In assessing whether section 18(f) applies in a particular case, the following factors have been identified as being relevant:

- (i) the amount of work involved in determining what information falls within the scope of the request;
- (ii) the difficulty involved in locating, researching or collating the information;
- (iii) the amount of documentation to be looked at;
- (iv) the work time involved;
- (v) the nature of the resources and the personnel available to process requests for information; and
- (vi) the effect on other operations of the diversion of resources to meet the request.

Each case needs to be considered on its merits to assess which approach may be appropriate under the Act. The principles to be applied are, however, reasonably clear. They are addressed in detail in the "Ombudsmen's Practice Guidelines," which are available from our office.

SUMMARY

The Official Information Act seeks to assist management of large and broadly defined requests by:

- (a) encouraging early identification of specific information the requester is seeking (section 12(2));
- (b) promoting communication between the agency receiving the request and the requester to assist this identification process (section 13);
- (c) providing incentives for requesters to keep requests within reasonable administrative parameters or risk-
 - * reasonable extension of the time limit for consideration of the request (section 15A);
 - * reasonable charges for making available the information requested (s.15(2));
 - * refusal of the request on the ground that the information cannot be made available without substantial collation or research (section 18(f)).

This issue of the Ombudsmen's Quarterly Review is intended to be an on-going resource for people involved with Official Information. It is in a form able to be photocopied and distributed within your organisation.

CASE STUDY 1

REQUEST NEEDS TO BE SPECIFIC

There had been a large and broadly defined request. The agency advised that it had difficulty in identifying what specific information was being requested. It had asked the requester to be more specific, as required by section 12(2).

The requester was adamant that the request was specific enough and that the agency was simply "*mucking him around*," and contacted our office.

The request had sought access to copies of "*all reports, Cabinet papers, briefing papers, notes, minutes, correspondence, e-mails and other information*" received or generated by the agency in respect of a particular policy initiative. The terms of the request were so wide as to potentially cover any information held by the agency on the topic in question. The requester was asked whether all such information was required. The requester clarified that:

- not all information on the topic was wanted;
- the main purpose of the request was to ascertain what advice the agency had received from other parties on the topic.

We suggested that the requester should advise the agency accordingly. Asked why the request could not have been stated more specifically to begin with, the requester explained that a standard form request set up on a word processor had been used. If the request can be stated in more specific terms then it should be so stated.

CASE STUDY 2

INFORMATION SOUGHT NEEDS TO BE "OFFICIAL"

The requester was a special interest group with a particular interest in progress on a policy matter being considered by Cabinet. The requester wrote to the relevant Minister requesting in wide terms all documentation held relating to that policy matter.

The Minister was concerned at the breadth of the request. While he had no difficulty responding in respect of any advice received from officials or papers prepared for Cabinet, the request technically also covered correspondence from electorate constituents and members of the general public in relation to the policy matter which had received attention in the news media.

The Minister's officials worked on the premise that all information technically covered by the specific terms of a request needed to be considered, whether it was likely to be relevant to the requester or not. The officials did not appear to have taken into account that the widely framed request implicitly reflected the possibility that the requesters did not know what specific information was covered by the request. Neither had the officials considered whether the requester might clarify that information which the group was not seeking.

During the course of the investigation it became clear that the requester was not seeking access to personal correspondence between the Minister and private citizens, but just the policy advice. That having been clarified the complaint was able to be resolved satisfactorily. Discussion between the requester and the holder at an early stage may have clarified the nature of the request and lessened the use of resources needed to respond to the request.

CHECK LIST FOR *HOLDERS* OF OFFICIAL INFORMATION

In processing a request for information, the recipient needs to consider the following:

- **What specific information has been requested?**
- **Can the information be identified?**
 - If not, contact the requester and give assistance to make the request more specific (section 13).
- **Is the information held?**
 - If not, decide whether the request should be transferred under section 14 or refused under section 18(e) or (g) ("*does not exist*" or "*cannot be found*" or "*is not held*").
- **Is what is held "official information"?**
 - S.2 of the Official Information Act furnishes a comprehensive definition and important restrictions such as that held by a Minister of the Crown "*in an official capacity*".
- **Are there any administrative or procedural reasons for refusal (section 18)?**
 - See also Ombudsmen's Practice Guideline No. 1.
- **Is it possible to make a decision on the request within the time limits of the Act (section 15)?**
 - If not, notify an extension of the time (section 15A); only one extension is possible.
- **If the information is held, consider:-**
 - Whether it would be reasonable to charge (section 15);
 - Whether alternative ways of making the requested information available may be more appropriate (section 16);
 - Whether the information available would require substantial collation and research (section 18(f)).
- **Is there good reason to withhold some or all of the information (sections 6 and 9)?**
 - What would be the predicted effect of disclosure?
 - Would that predicted effect prejudice one of the conclusive interests protected in section 6?
 - Would that effect prejudice one of the interests protected in section 9(2)? If so, is the interest in withholding outweighed by any countervailing public interest in disclosure in the circumstances of the case in terms of s.9(1)?

NOTE:

Corresponding provisions appear in the Local Government Official Information and Meetings Act when requests are made to local authorities.

CHECK LIST FOR *REQUESTERS* FOR OFFICIAL INFORMATION

A requester should consider the following:

➤ **What is the information required?**

- Knowledge of the likely form of the information and its authorship will very often enable refinement of the originating question and avoid the need for later clarification and amplification.

➤ **Who holds or is likely to hold the information?**

- Attention to this question may well avoid the complication of the originating request needing to be transferred, in terms of section 14.

➤ **Frame the request specifically to the information required (Section 12).**

- Is it clear what is being requested? For example, is it specific documents (such as advice received by Ministers from officials on a particular topic or policy matter), or general information about the current status of a particular matter.
- If it is not possible to be more specific but the requester is happy to discuss the request, this should be made clear and a contact telephone number or address provided.
- An initial request for general information about the status of work in progress on a particular topic is likely to enable a follow-up request for specific information to be stated with particularity.

➤ **Purpose of the request?**

- Although the Act does not require a requester to specify the purpose of the request, disclosure of the purpose may facilitate the process of identifying relevant information and reaching a decision on whether the request is to be granted, and if so at what cost, in what form and on what conditions.
- Technically a request may cover information of a type not in fact being sought, such as personal correspondence. Early clarification that such information is not being sought can reduce the time needed to process the request.

➤ **Can the request be modified if it cannot reasonably be met in the manner originally requested?**

- If the request potentially covers a far greater range of information than expected, indicating a willingness to narrow the parameters of the request or accept a response in alternative format (e.g. oral briefing, summary), may speed up the response time.