

## Editorial

# PRACTICE GUIDELINES

More people appear to be seeking access to official information.

As a result we have received an increasing number of requests to provide guidance to departments and organisations and other bodies subject to the Ombudsmen Act and the Official Information Acts on their obligations under those Acts. However, given our statutory investigatory and review function, we are constrained in how we may advise on matters which may later be the subject of a complaint to us.

In 1993, to supplement the general guidance provided through our annual reports to Parliament and the publication of Compendia of Case Notes, there commenced publication of Practice Guidelines designed to explain the role and functions of an Ombudsman and what a department or organisation or, indeed, a member of the public making a complaint, can expect during the course of an investigation under either the Ombudsmen Act, the Official Information Act or the Local Government Official Information and Meetings Act.

The Guidelines were published in loose leaf form so they could be easily copied and distributed more widely by departments or organisations or other bodies with an interest in what the Guidelines say. The loose leaf format allows for easy replacement of existing material as Guidelines are updated or otherwise amended. We have assumed that the Guidelines are helpful and are being used.

However, in the last two months, our staff have received several requests for “*publications detailing the Ombudsmen’s general approach on issues*” from departmental staff who have been unaware that the Practice Guidelines exist and are readily available. Changes in staff in the public sector can lead to loss of institutional memory.

That such loss of institutional memory can also lead to departments and organisations being unaware of readily available publications designed primarily to assist them is of concern.

The purpose of this editorial is to draw attention to the fact that:

- “ the Ombudsmen do publish (and have since 1993) Practice Guidelines which set out our general approach to various issues which arise under the Ombudsmen Act and, in particular, the Official Information Act and the Local Government Official Information and Meetings Act;
- “ copies of these Practice Guidelines (and any updates) are readily available to all agencies subject to our jurisdiction;
- “ the Guidelines are produced in a format that allows recipients to easily make as many further copies as they wish for distribution among their staff;
- “ if agencies wish to purchase additional copies our Office is happy to make these available.

Departments and organisations and other bodies subject to the Ombudsmen's jurisdiction have access to our Practice Guidelines as an aid in processing the growing number of official information requests.

# Confidentiality of Public Submissions

Public submissions to organisations subject to the Official Information Act or the Local Government Official Information and Meetings Act are not necessarily available to the public.

When such organisations invite public submissions, interested parties can seek access to them under the above Acts. But uncertainty may arise as to the extent to which the submissions should be considered as private to the submitters or be otherwise confidential. This can create difficulty both for the organisation concerned, and for the Ombudsmen if a complaint about withholding is made. It is often impracticable to consult directly with the submitters concerned because of their numbers.

Such uncertainty may be avoided if the terms of the consultation clearly indicate whether any submissions will be regarded as being publicly available unless the submitters request directly that their identities and/or the substance of the submissions are to be regarded as confidential.

At the same time, because of the OIA or LGOIMA there may be a result of the submission being made available to a requester - irrespective of the wishes of the submitter.

It may be appropriate in particular cases, however, for an organisation to state that it will regard all submissions as having been made in confidence, subject to any indication to the contrary from submitters and subject to the requirements of the OIA and LGOIMA.

The Ombudsmen would anticipate that such an implied undertaking of confidentiality would be indicated only exceptionally and in special circumstances. It is also helpful if organisations emphasise the distinction between confidentiality for the identity of submitters and for the substance of submissions. Usually, there will be significant public interest in disclosing the substance of a submission but no great public interest in disclosing the identity of the author.

Legal professional privilege in relation to the Official Information Act and Local Government Official Information and Meetings Act has been discussed in some detail in previous editions of the OQR - Vol 2 No 2, June, 1996; Vol 2 No 3, Sept, 1996; and Vol 4 No 3, Sept, 1998.

A point made in some of these discussions is that although information may have been the subject of privilege at the time it came into existence, this will not provide a basis for refusing a request if the withholding of that information is no longer necessary to "*maintain legal professional privilege.*" Where privilege has been waived it cannot be said that such withholding is necessary.

Waiver of legal professional privilege need not be express; it can be implied and contrary to the wishes of the party claiming it. A recent case concerning a local authority illustrates this.

The Council in question had undertaken certain transactions concerning a property. It had sold the property for a particular sum and it was later asserted by others that a higher price might have been obtained.

Thereafter, a person who had tendered for the property sought all the information concerning the matter, including legal advice, from the Council. The Council refused, relying on s7(2)(g) of LGOIMA in doing so.

While it was clear that the legal advice provided to the Council had been privileged at the time of its receipt, it became apparent that this privilege had effectively been waived through later actions of the Council. These actions consisted of statements made to and published by a newspaper. In particular, a senior Council executive had disclosed on two separate occasions that legal advice had been received, as well as the essential nature of that advice.

This was seen as analogous to a matter dealt with by the High Court in *Chandris Lines Ltd v Wilson & Horton* [1981] 2 NZLR 600, where waiver had occurred in the context of a newspaper article. In that case, Barker J stated that:

*‘The defendant advised the world it had the report. It disclosed part of its contents. Yet it still refuses to disclose the whole document. I consider that in all the circumstances ... that there has been a waiver of privilege.’*

In the circumstances of the case involving the Council, it was concluded that withholding of the information was no longer necessary to maintain legal professional privilege. The Council agreed to disclose it.

## ***Student Loan Payment Recovery Procedures***

There does not appear to be any statutory authority under the Student Loan Scheme Act for relief to be granted in respect of a student loan.

The Ombudsman investigated a student's long-running complaint (spread over five years) about whether her student loan account was in debt or in credit as a result of a series of actions by the Ministry of Education, Student Loans Management Ltd, the Student Loans Account Manager and Inland Revenue Department.

She complained that a series of wrong actions by these agencies had disadvantaged her in respect of her student loan debt. But for these, she contended, her debt was in fact still increasing when it would have been paid off.

The student identified eight specific actions by the agencies as having contributed to this situation. The Ombudsman, while not able to identify one action more than another which could be said to have caused this situation, formed the view that she had been disadvantaged. A number of omissions and wrong actions were identified which cumulatively, and independently of actions she herself might have taken, had resulted in this.

The nature of the disadvantage consisted of her not being provided with any official record of her student loan account for three and a half years. Therefore, during that time she had acted in the dark and could not reasonably have been expected to set herself budget or repayment targets for her loan.

Against the backdrop of the equitable principle enunciated by s94B of the Judicature Act, the view was formed that it was reasonable for the Ministry and IRD to make *ex gratia* payments of equal amounts, totalling her small current student loan debt, either directly to her or into her student loan account. This they did.

### **CLINICS A USEFUL SOURCE OF ADVICE**

**The Ombudsmen regularly conduct “clinics” in areas where there is no easy access to one of their offices.**

Investigating officers are available to discuss with members of the public any problems that may have arisen with central or local government organisations and can advise on what assistance an Ombudsman might be able to give.

Sometimes the advice given at a clinic will enable a complaint to be resolved without any need for a formal Ombudsman investigation.

A recent example of this arose at a clinic in the Bay of Plenty. The potential complainant had found himself in a confusing situation over the payment of a travel allowance for treatment in another centre. Three separate health entities, now called Hospital and Health Services, were involved and it was not clear which had the responsibility to pay for the travel allowance due.

Being aware that the Health Funding Authority had some oversight for the funding of health services, the investigating officer suggested that the complainant write to this organisation in the first instance, and ask it to advise which Hospital and Health

Service should provide the refund. He did this and the HFA immediately referred the matter to the correct hospital for payment.

The complainant had his refund within a matter of weeks.

## *Information soon to be available*

When information is soon to be made available publicly in any event, that may constitute sufficient reason for the holder to decline to release it when requested.

A Residents' Association sought copies of unconfirmed minutes of a Council's standing committees. It wanted to receive the information before the next meeting of the full Council to enhance its ability to participate effectively in the Council's actions and decisions.

The request was declined pursuant to s17(d) of the Local Government Official Information and Meetings Act - that the information requested would soon be available publicly.

S51 of LGOIMA requires minutes of local authority meetings to be available for inspection and copying. Acting on legal advice that these provisions did not apply to draft or unconfirmed minutes, the Council declined the request pursuant to s17(d).

S46A of LGOIMA permits members of the public to inspect, at least two working days before every meeting of a local authority, all agendas and associated reports relating to the meeting circulated to members.

As the Association thus had access to the same agenda papers as Councillors (with some exceptions, such as items to be taken with the public excluded), it did not seem that the Council's refusal would affect detrimentally the Association's chance to participate in the Council's actions and decisions.

S17(d) of LGOIMA was applicable and provided authority for declining to make available the information requested.

## **CONSOLIDATED INDEX**

This is a Consolidated Index of articles appearing in the most recent 13 issues of the Ombudsmen "Quarterly Review" - running from March, 1997, to March, 2000. The first number is the folio (year) - 3 being 1997, 4 being 1998, 5 being 1999 and 6 being 2000 - and the second number is the issue (quarter). For reasons of space, all references to the first two years (1995 and 1996) have been deleted from the Index.

### **Benefit –**

- Relationship that has stopped being personal should have no impact on a benefit 4-3.
- Rights of review 5-3.

### **Commercial –**

- Always check the details 4-2.
- Information about joint ventures 3-3.
- Requests for details about consultants and their fees 3-2.
- What is a "commercial activity?" 3-2.

### **Education -**

- Gross misconduct by students must be "gross" 3-1.
- Non-custodial parent and the school prize list 5-2.
- Student loan not enforceable if student never enrolled 4-3.

### **Health -**

- Not all health information is private 3-1.

**Immigration -**

- Approvals, permits and visas 5-3.
- Refusal because of drugs 3-1.

**Local authorities -**

- Building plans not always confidential 3-4, 6-1.
- Care needed with conditions 3-4.
- Care needed with wording 5-3.
- Charges and fees 3-4.
- Deed of confidentiality 5-2.
- Non-notified resource consents 4-4.
- Right to know 5-4.
- Trees need to be “notified” to be saved 4-3.
- Workshops not covered by Ombudsmen Act 3-2.

**Official information -**

*All of 4-1 is devoted to official information, including checklists for requesters and holders.*

- Approach for information needs to be direct 4-2.
- Attitude of openness 4-2.
- Charging for information 5-1.
- Common sense v letter of the law 3-4.
- Conditional identity 5-4.
- Duties on holders 5-3.
- “Good faith” 6-1.
- Informants’ names may be kept confidential 3-2.
- Information must be kept 5-4.
- Information needs to be accurate 6-1.
- Information needs to be more timely 3-1.
- Legal professional privilege 4-3.

**Official Information cont'd**

- Non-documentary information 4-3.
- Private information held by politicians is not official 2-4.
- Processing by a caretaker Government 5-4.
- “Public interest” or of interest to the public 5-2.
- Some Government agencies not covered by OIA 4-3, 5-2.
- Training on OIA obligations 5-4.
- When information is “held” 5-1, 5-2.

**Ombudsmen’s Office –**

- Actions must conform to “reasonable” standards 4-4.
- Onus on Government agencies to get facts right 4-4, 5-1.
- Oversees administration, not law or policy 4-4, 5-1.
- Reviewing role 5-2.
- Unnecessary reviews 6-1.
- Use of the term “Ombudsman” 5-2.

**Parliament -**

- Breach of privilege 5-4.
- Investigation of IRD 6-1.
- Material donated to National Archives may not be subject to OIA 6-1.

**Police -**

- Videotapes not public 3-1.
- Internal documents may be withheld 5-2.

**Prisons –**

- Charges for escorted leave 4-4.
- Details of prison visits disclosed 4-2.
- Disclosure of parole details 3-2.
- Manual must be made available 4-4.



Theft in gaol may be prison's responsibility 5-1.

**Privacy -**

Availability of names and employment details of officials 4-4.

Need for confidentiality can override right to know 3-3.

Police videos not public 3-1.

Privacy and mental illness 5-1.

Protection of privacy 3-4.

**Superannuation -**

Complainants against ISS need to persist 4-2.

Organise business in advance 3-4.

**The site has been established on the World Wide Web in June and provides general background about the Office as well as access to our publications.**

**All of the Ombudsmen's Practice Guidelines, editions of the Quarterly Review (*Te Arotake*) and the Office's most recent Annual Report to Parliament may be viewed at the site.**

**The URL is <http://www.ombudsmen.govt.nz>**

**If any recipient of hard copy versions of any of our publications would prefer access to them on the website instead, please send us an email to the following: [office@ombudsmen.govt.nz](mailto:office@ombudsmen.govt.nz).**

**The Year 2000 edition of the jurisprudence of the Office of the Ombudsmen - the 12<sup>th</sup> Compendium of our Case Notes - is about to be published.**

This 250-page book includes cases considered and recommendations reached by the Ombudsmen, and outcomes on issues involving the Ombudsmen Act, Official Information Act and Local Government Official Information and Meetings Act, since the previous compendium was published in 1998.

The Case Notes will be sold for \$25.00 per copy and are available from the Office of the Ombudsmen, P.O. Box 10-152, Wellington, New Zealand. Our street address is 14th floor, Sun Microsystems House, 70 The Terrace, (at the corner of The Terrace and Aurora Terrace), Wellington. Please send a cheque or money order with your order form.