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Welcome to the first issue of the "Ombudsmen Quarterly Review"

Welcome to the first issue of the "Ombudsmen Quarterly Review",. a publication which will keep you in touch with significant issues which have come across the Ombudsmen's desks. It is intended that the publication will be a resource base for organisations and individuals with whom the Ombudsmen come in contact, providing help and guidance particularly on the provisions of the Official Information Act and the. Local Government Official Information and Meetings Act. It is our intention that the "Ombudsmen Quarterly Review" be kept for future reference. The information within it should remain relevant.

In addition actual case notes (published separately) will identify the outcomes of some investigations illustrating the range of problems which are referred to us, and the solutions which have been recommended.

I hope you will find this new arrival on your desk both informative and helpful.

Sir Brian Elwood

Chief Ombudsman

New Ombudsman Takes Office

Anand Satyanand took the oath of office as an Ombudsman at Parliament on 14 February 1995 before Speaker Peter Tapsell and is now operating out of the Wellington and Auckland Offices of the Ombudsmen.

Mr Satyanand. a District Court Judge from Auckland, whilst retaining his judicial warrant, will be a full time Ombudsman and will not be undertaking any judicial duties. He will be taking up residence in Wellington.

In welcoming Mr Satyanand, Chief Ombudsman Sir Brian Elwood, said "New Zealand is fortunate in having as an Ombudsman a person of Anand Satyanand's standing. He has a practical and principled interest in ensuring fairness and justice for all citizens."

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The editor of the Ombudsmen's Quarterly is Olivia Mitchell, LLB, an investigating officer with the Office of the Ombudsmen. Olivia is a member of the Office's Official Information Act team of investigators and will welcome suggestions from readers as to any particular item or information they would like discussed in future issues

OMBUDSMEN ACT ISSUES

Local Authorities Must Exercise Care

The Ombudsmen have received several complaints recently from people who have found that an application for a resource consent has been approved without notification and yet they consider they will be adversely affected.

Under section 94(2) of the Resource Management Act applications for resource consents need not be notified only if:

- The local authority is satisfied that the adverse effect on the environment would be minor; and

- Written approval has been obtained from everyone the local authority considers may be adversely affected, unless the local authority considers it unreasonable to require the obtaining of such approvals.

The purpose of notification of an application is to ensure that persons who may be adversely affected are given an opportunity to object, and, if necessary, to appeal to the Planning Tribunal. The Chief Ombudsman has commenced that *"as non-notification deprives any potentially affected parties of those rights, it is important that local authorities exercise with care the discretion provided by section 94."*

Ombudsmen can Review School Expulsions

There has been recent comment made about the need for an independent review authority to review decisions of schools to suspend or expel children. The Ombudsmen are in fact, such a review authority and may under the Ombudsmen Act review whether the decision to suspend or expel a child:

• Appears to have been contrary to law,

• Was unreasonable, unjust, oppressive or improperly discriminatory,

• Was based on a mistake of law or fact; or
• Was wrong.

The Ombudsmen's recent experience in reviewing decisions to expel or suspend a child has shown that some Boards of Trustees do not appear to be aware of the procedural requirements of the Education Act. These requirements must be followed when a decision is taken to expel or suspend a child. In one case the parents of a 17 year old student were advised that the Principal had decided not to enrol the student for the next school year. As the Principal had no legal authority to make such a decision, the Principal and the Board of Trustees then sought to expel the student in terms of the Education Act, but did nor follow the required procedure. The Board minutes disclosed that it did nor understand the requirements of the Act and had made an invalid decision. Following the Ombudsman's investigation, the school reinstated the student subject to mutually agreed conditions.

In another case, a Principal suspended a 14 year old for an unspecified period. The Board decided to extend the suspension until it received a written report from a counsellor that the student was not likely to repeat the type of conduct which had led to the suspension. That decision did not appear to meet the requirements of s.16(1)(b) of the Education Act which requires the Board to extend the suspension for "a specified period". However, because of other aspects of the case no recommendation for reinstatement was made.

Another investigation disclosed that neither the Principal nor the Board had reached any conclusion on the student's conduct as required by s.13(1)(a) or (b), and therefore, that it could nor impose a penalty. Furthermore, the conduct at issue did not appear to amount to "gross misconduct" as interpreted by the High Court. As a consequence, the student's suspension was lifted. unconditionally.

It is therefore important for Principals and Boards of Trustees to familiarise themselves thoroughly both with the procedures prescribed in the Education Act and with the judicial interpretation of those procedures.

OFFICIAL INFORMATION ACT ISSUES

School Report Withheld

Are parents automatically entitled to school reports about their children?

The issue of whether a parent may have access to information about one of their children, when he or she has made a request to a school for such information, is one which must be considered under the Official Information Act. A case recently concluded by the Chief Ombudsman illustrates that the outcome is entirely dependent on the particular circumstances of the case. The child, an intelligent and well-adjusted teenager, had had no contact with the parent for 5 years and was adamant that the parent not be given the school report.

Following consultation with the Privacy Commissioner, the Chief Ombudsman formed the view, in the particular circumstances of this case, that releasing the report to the parent would be an infringement of the child's privacy and therefore that section 9(2)(a) of the Official Information Act applied.

In considering whether there was a public interest in release the Chief Ombudsman took into account section 77 of the Education Act. This section requires that parents be advised of matters that are slowing a student's progress or harming their relationships with teachers or other students. Clearly, if this had been the case, there would have been a public interest in releasing the information. In the absence of any such factors, the Chief Ombudsman formed the view that there was no public interest in releasing the report to the parent. The Chief Ombudsman suggested to the school that it write to the parent explaining that the child was doing well at school and there were no matters which needed to be reported on in terms of section 77 of the Education Act.

Is it Frivolous or Vexatious?

Organisations subject to the Official Information Act sometimes feel plagued by requesters making numerous, time-consuming requests that in the eyes of the organisation seem to serve no useful purpose at all.

In these situations, the organisation will sometimes refuse a request under section 18(h) of the Official Information Act.

This section provides that a request may be refused if it is "frivolous or vexatious". In a number of recent cases, the Ombudsmen have made clear that this section cannot be used because the requester appears to be frivolous or vexatious. It can only be used where the particular request is frivolous or vexatious. A request is only likely to fall into this category if the information requested is substantially the same information as has already been provided and there is no further information on the subject which can be provided.

How Fast can I go?

A motorist who received an infringement notice from the Police as a result of a speeding offence detected by a speed camera, requested under the Official Information Act the speed in a particular area above which infringement notices were issued. The Police argued that possession of this information would allow motorists to break the law with impunity. The Chief Ombudsman agreed and concluded that there was good reason to withhold the information under section 6(c) of the Act which provides that information may be withheld if making it available would be likely to prejudice the maintenance of the law.

OFFICIAL INFORMATION ACT ISSUES

Results of TOPS Courses

The Chief Ombudsman has recently concluded an investigation into the refusal of the Education & Training Support Agency to supply the employment outcomes of TOPS courses. The ETSA had refused the request due to a concern that release of the information would be prejudicial to the commercial position of the training providers who are contracted by the ETSA to run the TOPS courses.

Following consultation it appeared that the training providers were concerned that release of the employment outcomes would enable prospective students to choose courses according to the employment outcome of each course. The implication was that trainees would choose chose courses with the best employment outcomes and therefore, the courses with low employment outcomes would suffer reduced enrolment.

The Chief Ombudsman accepted that the concern of reduced enrolments was valid and would be likely to prejudice the commercial position of the training providers.

However, he also formed the view that there was a public interest in the accountability of the ETSA in its function of contracting with the providers of TOPS courses. He identified a further public interest in a prospective student knowing relevant information concerning courses which they were considering enrolling on. The Chief Ombudsman's view was that these public interest considerations favouring release of the information together outweighed the interest in withholding the information under section 9(2)(b)(11). Therefore, there was no good reason to withhold the information.

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Questions & Answers

Q: **How can you tell whether a request should be made under the Privacy Act or the Official Information Act?**

A: The Privacy Act applies whenever the requester is asking for personal information about themselves. However, if the requester is asking for personal information about other people then the Official Information Act will apply.

Q: **What if the information requested is about the requester and about other people?**

A: In this case, both Acts apply. If the request is refused and the requester wants to appeal the refusal, the Office of the Ombudsmen and the Office of the Privacy Commissioner will coordinate the parallel reviews.

Q: Can a public sector organisation refuse personal information about other people because of the Privacy Act?

A: No, the organisation must consider the request under the Official Information Act. Section 9(2)(a) of that Act provides char information may be withheld if it is necessary to protect personal privacy and if there are no public interest considerations which outweigh the interest in privacy. The Privacy Act is relevant when assessing under section 9(2)(a) whether information should be withheld to protect personal privacy, but it is not the determining factor.

If you would like more information about the interface between the Privacy Act and the Official Information Act please phone the Wellington Office of the Ombudsman on (04) 473-9533.