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Editorial

Requests for Official Information which raise Privacy Interests

Public sector agencies which are subject to the Official Information Act 1982, the Local Government Official Information and Meetings Act 1987 and the Privacy Act 1993 have been experiencing considerable difficulty when .responding to requests for information about identifiable individuals. Deciding which Act applies to the information is not always straightforward. However, there is a *"rule of thumb"* which can be helpful. Generally speaking, if the information is requested by the individual concerned, the Privacy Act applies. If the information is requested by a third party, the Official Information Act applies.

The starting point when considering any request for official information is s.5 of the Act which provides that *"information shall be made available unless there is good reason for withholding it"*. Sections 6, 7 and 9 of the Act identify interests which may need to be protected and may provide good reason for withholding information. In most cases requests for personal information about a third party raise privacy issues in respect of the individual concerned, and therefore consideration has to be given to the applicability of s.9(2)(a).

.Under s.9(2)(a) good reason for withholding information exists only where it is established -

> (a) that it is necessary to withhold the information to protect the privacy of the person; and
>
> (b) that there is no countervailing public interest consideration favouring disclosure.-

7he crucial point is that the fact it is necessary to withhold information to protect the privacy of an individual is not, of itself, sufficient to establish *"good reason for withholding information"* under s.9. Consideration of any countervailing public interest factors favouring disclosure is an integral part of the determination of whether or not there is good reason to withhold information.

Even though certain information may be private, release under the Official Information Act of some or all of the information is justified if the public interest is stronger than the privacy interest. Factors which may outweigh the need to protect personal privacy in a particular case can be accountability for decision making by a public sector agency, accountability for adequate procedures or accountability for expenditure.

In assessing the strength of the countervailing public interest in a particular case, a distinction must be drawn between matters which are of legitimate concern to the public and those which are merely interesting to the public on a human level.

The balance between personal privacy and legitimate public interest needs to be carefully considered. Options available under the Official Information Act for partial disclosure of information., for example, the use of deletions or disclosure of information in summary form, may be appropriate. In this regard, it is important to keep in mind that, for the purposes of s.9(1), the countervailing public interest consideration can sometimes be met by alternative disclosure of sufficient relevant information, for example, about the procedures or decision-making process, rather than release of the actual information itself.

Where a department or Minister of the Crown or organisation believes, in good faith, that the countervailing public interest in disclosure of certain information outweighs the need to withhold that information to protect personal privacy, then s.9(2)(a) does not provide good reason for refusal under the Official Information Act. It is for the holder of the information to make a decision on what information is to be disclosed. <u>Release of information in good faith under the Official Information Act will not breach any provisions of the Privacy Act.</u>

Sir Brian Elwood
Chief Ombudsman

Anand Satyanand
Ombudsman

When is Official Information 'Held'?

Both the Official Information Act and the Local Government Official Information & Meetings Act define *'official Information'* as any information *'held'* by a government organisation or local authority. This means that, subject to some limited exceptions, any information in the physical possession of such a body will be *'official information'* and may be subject to request. Conversely, in the majority of cases where information is not physically held. the information will not be *'official information'*..

There is, however, an important exception to the latter instance. Section 2(5) of the Official Information Act provides that:

> *'Any information held by an independent contractor engaged by any Department or Minister of the Crown or organisation in his capacity as such contractor shall, for the purposes of this Act, be deemed to be held by the Department or Minister of the Crown or organisation.'*

And section 2(6) of the Local Government Official Information & Meetings Act provides that:

> *'Where any local authority enters into any contract (other than a contract of employment) with any person in relation to any matter, any information that is held by that person and to which the local authority is, under or by virtue of that contract, entitled to have access, shall be deemed to be held by the local authority'.*

In other words, if government organisations or local authorities engage third parties to undertake work (of whatever nature) on their behalf, any information held by those contractors relating directly to the work undertaken will, in most cases, constitute 'official information'. Such information can be requested under the relevant Act and may only be withheld by the government organisation or local authority for one or more of the reasons stated in the Act. Otherwise, the information must be made available. A request may not be refused simply because the information happens to be in the physical possession of an independent contractor.

Charging for Information

A complaint was recently received under the Local Government Official Information and Meetings Act about the amount charged by a local authority to supply information. The requester, a news media organisation, had been advised that the information would be made available subject to its agreement to pay the fixed charge. The requester reluctantly agreed. However, the information was first made available to other news media organisations, who had not requested the information, without charge. On reflection, the local authority agreed that in the circumstances it was not reasonable to charge only the original requester. Therefore, the charge was waived.

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Parliamentary Questions and the Official Information Act

The Chief Ombudsman recently dealt with a complaint from an Opposition MP about the response provided to parliamentary questions. The MP had asked questions in Parliament for a written answer and had received responses which refused to answer the questions on the basis of provisions of the Official Information Act and the Privacy Act. The complainant was advised that there was no authority to investigate the matter. Curiously, the basis for this outcome could be found in Article 9 of the Bill of Rights Act 1688 which still applies in New Zealand. Article 9 states:

> *"That the freedom of speech and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."*

As the questions and the answers were clearly pail of the proceedings of the House, the Minister was incorrect to cite the Privacy and Official Information Acts in responding to the questions. The Chief Ombudsman declined to investigate the complaint and explained the position to both parties. The complainant then wrote to the Minister seeking the information outside the bounds of the proceedings of the House of Representatives.

Improper Gain?

An organisation subject to the Official Information Act \vas contracted by a Company to conduct a series of trials on an experimental animal remedy and to report on the results. Following the trials, the reports were not completed or provided to the Company because payments due by it for the trials undertaken were substantially in arrears. The Company subsequently was placed in receivership. After the Receiver made a financial arrangement with the organisation in respect of unpaid accounts, the reports were compiled and provided to the Receiver.

The former Managing Director of the Company made a request to the organisation for the completed reports under the Official Information Act. Section 9(2)(k) of the Official Information Act provides that information may be withheld where it is necessary to prevent the disclosure or use of information for improper gain or improper advantage. The Chief Ombudsman accepted the organisation's argument that for the requester to be able to access by means of the Official Information Act reports not available to him because of non-payment of accounts would provide him with an *improper gain* in terms of s.9(2)(k) of the Act. The reports, paid for by the Receiver, were properly the property of the Receiver and the requester needed to approach him and meet the Receiver's requirements for access to what were considered to be commercially valuable reports

The Use of 1080 and Non-Notified Resource Consents

A complaint was made that it was unreasonable for a local authority not to publicly notify an application for a resource consent to carry out an aerial 1080 poison operation. Oil investigation it needed to be established that in an administrative sense, the Council had followed appropriate procedures in taking its decision not to notify the application, and in particular whether it had access to proper advice and scientific evidence and whether it had regard to appropriate judicial precedents. Although an assessment of the scientific evidence was clearly central to the complainant's concerns in this matter.

The Chief Ombudsman made it clear that it was not his role to form a conclusion on the effects of 1080.

Under the provisions of section 94 of the Resource Management Act, there are two points on which a local authority must be satisfied before it may decide an application for a resource consent need riot be notified:

(1) That the adverse effect on the environment of the activity for which consent is sought will be minor: and

(2) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

There was extensive evidence that 1080 breaks down rapidly in water and that its effect on that its effect on that environment is minor. It was acknowledged that there are contrary 'views but the Chief Ombudsman nevertheless concluded that in deciding that the aquatic effects of 1080 were minor the local authority had considerable technical evidence to support its approach. He also noted that the local authority had regard to a recent High Court decision which allowed a non-notified procedure.

Taking all the factors into account it was reasonably open to the local authority to conclude that the adverse effects on the environment for which the resource consent was sought would be minor. Given the evidence of breakdown and dilution of 1080 in water, it was not unreasonable to form the view that only property owners whose properties were to be treated by aerial application 1080 should be seen as adversely affected. The local authority had therefore acted reasonably in not requiring a public notification of the application

The conclusion related only to the application in question for the defined area as each case will depend on its own facts. Additionally, as new evidence on the effects of 1080 comes forward, local authorities will need to consider it carefully when further 1080 applications are made before deciding whether non-notification is justified.

Invoicing by Council for Court Costs

A Council invoiced defendants for anticipated court costs and solicitors' fees before there had been either a hearing or a judgment entered. The complainant was concerned that the Council was demanding payment of money when it was not legally payable. He was advised by the Council that the invoice's purpose was simply to record the Council's view of money owed and its intention of actually recovering it.

The District Court Rules provide that unless an award of costs is made by the Court, either on the entry of judgment or a finding for the defendant, then no liability arises on either party to pay costs. While a Council incurred a filing fee and other costs when commencing an action, there is no right to seek immediate recovery of those costs from the defendant.

It was a matter of concern that the Council referred to the matter as an accounting procedure to record the costs involved against the debtors' account. It was considered that anyone who received such an account could only believe that it was due and payable as the remittance advice referred *'Please pay on this invoice to your nearest service centre'*. The Ombudsman advised the Council that its practice was unreasonable.

The Council suggested that in respect of defended court actions it would remove the invoiced costs from the account and further, on issue of the invoice would include the following statement:

'Court.filing fees: These Court costs have been incurred in pursuit of this account and we will seek recovery of these as part of any Court action.'

The Ombudsman considered these amendments resolved the matter.

Steps to Freedom Grant

A complaint was received from an inmate of a Prison institution who upon release on bail from Court applied to the Department of Social Welfare for a Steps to Freedom Grant. Because she had been released directly from the Court she did not have the necessary release papers. She asked that enquiries be made with the Prison in order to confirm her entitlement but was later declined on the grounds that she had not served 31 days in custody.

After enquiries by the Ombudsman with both the Department of Social Welfare and the Prison Authorities it was established that there had been some mis-communication between the Prison and the Department of Social Welfare. While it was apparent that the inmate's release from the Court had complicated matters, there was also confusion as to whether inmates had entitlement if time in custody had been on remand. As the release procedures and communication between the Department of Social Welfare and the Prison Authorities appeared to require some clarification the Secretary for Justice was asked to consider undertaking a review of procedures so there was some uniformity in the discharging of inmates held on remand and in custody.

As a result of the review, procedures were put into place which enables the identification of those inmates eligible for the Steps to Freedom Grant.