

**Editorial**

***Legal Professional Privilege and Official Information***

The Official Information Act 1982 has always recognised, legal professional privilege as a possible ground for withholding official information. This shows Parliament has accepted the common law view that there is a strong public interest in ensuring people may obtain confidential legal advice without fearing that this will later be disclosed without compelling reason.

What is the privilege? In essence, it is that of the client to keep communications between lawyer and client relating to the seeking or giving of legal advice confidential. It matters not whether the lawyer is a salaried employee or in private practice. In addition, where legal proceedings are involved, either already commenced, or reasonably apprehended, the privilege extends to communications with third parties, but only where the dominant purpose underlying such communications is to assist the lawyer to conduct or advise on the proceedings.

- Although the privilege may be claimed, it may also be waived. Waiver may even occur without the client realising the fact and may be contrary to any wish in this regard. Such implied waiver can occur, for example, where privileged material has been disclosed in part and the circumstances are such that it would be unfair not to disclose the remainder.

- The recent case of *Tua v Durie (1996) H.C. Wellington CP215/95, 27/2/96 McGechan J*, contains an example of implied waiver, contrary to a client's expectations. The statement of defence, in denying various allegations, had also made positive assertions in this regard, stating that an independent legal opinion had been obtained and had been relied on regarding a matter at issue. The implicit suggestion was that the opinion favoured the stance of the defence and in that context, the Judge said it would "be quite unfair to permit the [person claiming privilege] to blow hot as to the existence of content of the opinion, but cold on disclosure". He held privilege to be waived.

- Legal professional privilege cannot be invoked for communications that are not in the context of "legal advice", from a practising lawyer. Moreover, if professional legal advice is merged into advice from a non-lawyer, the privilege may be lost through that merger.

- A communication is not "legal advice" simply because a lawyer may be the source of the information. The lawyer must have been acting in a professional capacity, not an executive one, and the information must have come into existence for the purpose of providing legal advice.

The question of whether information may properly be withheld on the grounds of legal professional privilege is often a complex one that cannot be addressed in an editorial as short as this. Nevertheless, its content may give some guidance as to the essential matters that require consideration when faced with a request for information 'of a legal nature'.

Where information has been refused on the grounds of maintaining legal professional privilege an Ombudsman's task on review can be threefold.

***First, to consider whether the information is of a kind to which the privilege applies.***

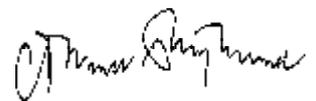
***Secondly, if the information is of that kind, to consider whether the privilege has been waived.***

***Thirdly, if the privilege has not been waived, to consider whether there are any public interest factors favouring release that outweigh the public interest in the need to maintain the privilege.***

Legal professional privilege and its maintenance remain important.



Sir Brian Elwood  
Chief Ombudsman



Anand Satyanand  
Ombudsman

## **ADDRESS UNKNOWN ...the case of the unknown boxholder**

A complaint was received from a private investigator who had asked New Zealand Post to give him the name and address of the holder of a particular box number. The investigator had been attempting to trace the whereabouts of an alleged debtor, but no proceedings had been issued, nor were any in contemplation when the request was made. The request had been refused on the grounds that withholding the information was necessary to protect the box holder's privacy.

The Ombudsman consulted the Privacy Commissioner, as required, to seek his views on the privacy issue. The Privacy Commissioner noted that it would not be a breach of any relevant privacy principle if the information were required for the conduct of court proceedings that had been commenced or were reasonably in contemplation but because this was not the case, disclosure of the information would infringe the box holder's privacy.

The Privacy Commissioner was also of the view that the level of public interest in disclosing the information for the possible benefit of a creditor was very small. However, it would be different had there been some evidence of criminal activity that was under investigation by a public sector agency.

The Ombudsman accepted that withholding the information was necessary to protect the privacy of the box holder, and that the public interest that would be served in assisting a creditor to pursue inquiries about an unpaid debt, was insufficient to outweigh the interest in the protection of the box holder's privacy.

## ***EXTRA-CURRICULAR ACTIVITIES*** **HAZARDOUS SUBSTANCES**

It is not one of an Ombudsman's statutory functions to make recommendations for legislative change outside the context of an investigation. However, it is necessary to keep up to date with proposed new laws and changes in existing laws in order to determine what impact they may have on both the resolution of complaints, and the operations of the Office.

As part of their functions, Departments often consult the Office regarding such matters in the course of a Bill's preparation. In addition, the Office's Legal Counsel sees all Bills as they pass through the various stages of the Parliamentary process and draws the attention of the Ombudsmen to any proposals he notices that he may have an effect on the operations of the Office, or that may seem to be inconsistent with an Ombudsman's functions under other existing legislation.

Where this occurs, an Ombudsman may draw the attention of the appropriate Department, Minister or Select Committee to the perceived difficulty, and suggest clarification or a possible solution of the problem.

This recently occurred with the Hazardous Substances and New Organisms Bill, where, after consideration by the Select Committee, it was noted that certain suggested amendments might impact on the operation of the Official Information Act 1982, but that the proposals appeared to be ambiguous.

Correspondence with the Minister resulted in the issue being clarified, and the Minister deciding to introduce a supplementary order paper to ensure that the Bill could be appropriately amended before its passage into law.

# ***OUT OF COURT SETTLEMENTS***

## ***Confidentiality v Accountability***

A recent investigation neatly identified the conflict between the concepts of confidentiality and accountability and established, on the particular facts, a situation where accountability outweighed confidentiality.

The question often arises whether parties to court proceedings can keep the terms of out-of-court settlements confidential by providing for confidentiality as part of the settlement.

The Courts have confirmed that agreements as to confidentiality do not, of themselves, permit information to be withheld under the legislation. Instead, a realistic assessment has to be made of the nature of the particular information and the likely consequences of disclosure before considering whether it may be withheld. If prejudice to a protected interest cannot be shown, the information must be made available.

However, where an out-of-court settlement has stipulated that the details are to be kept confidential, disclosure may prejudice the future negotiation of out-of-court resolution of disputes and a strong public interest is recognised in public authorities being able to resolve such matters without lengthy and costly litigation. This factor may thus provide a possible basis for withholding such details.

Nevertheless, before the information could be withheld on that basis, it is also necessary to consider whether there are

other public interest considerations in favour of release that outweigh the public interest that would be served by withholding the information.

In the case in question, the issue arose in the context of a claim by a Council against several defendants relating to the alleged defective construction of a stadium. One of the key elements of this case was that the public had raised a substantial amount of money for its construction and it was public knowledge that Court proceedings had been filed by the Council and that these had been settled.

Part of the settlement, which was in the nature of a without prejudice agreement between the parties, included a confidentiality provision. The Council refused a request for details of settlement. In these circumstances the Chief Ombudsman was of the view that whilst grounds existed for withholding specific details of the settlement, nevertheless the public interest in having information about the settlement outweighed the need to withhold all of the requested information.

The solution was the publication of a statement disclosing the final settlement figure within a narrow band, but not disclosing the contributions made by the individual defendants. Disclosure on that basis did not breach the confidentiality of the individual settlement contributions, but reasonably met the public interest in the accountability of the Council for its actions.

## ***BOUQUET FOR TRANSIT NEW ZEALAND***

### ***ANSWERS THAT PROVIDE ANSWERS***

The Ombudsman recently expressed his appreciation to Transit New Zealand for its comprehensive replies to a complainant's letters. He noted that in all its correspondence with the complainant - from the local area office to the General Manager - Transit New Zealand had provided reasoned and detailed explanations for its decisions and actions.

Frequently the Ombudsmen need to ask organisations to explain the reasons for their decisions to affected parties. Where no explanation has been given, parties may consider the decision arbitrary or unreasonable.

In this context the statutory rights created by sections 22 and 23 of the Official Information Act 1982 and their equivalents in the Local Government Official Information and Meetings Act 1987 should be borne in mind. These rights are rights of access to-

- (a) internal rules affecting the decision; and
- (b) the findings of fact that have been made; and
- (c) a reference to the information on which the findings were based; and
- (d) the reasons for the decision or recommendation.

Accordingly, when a Minister, Department, Organisation, or Local Body receives a complaint about a decision or recommendation that has affected the complainant, these matters should not be overlooked. The provision of an explanation that addresses these issues eliminates the additional work that a subsequent request for information would create and reduces the likelihood of a complaint to, and possible investigation by, an Ombudsman.

# **ARE YOU "AFFECTED" WHEN "OFFENDED"?**

## **JURISDICTION TO INVESTIGATE COMPLAINTS**

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A complainant wanted the Chief Ombudsman to investigate the publication by the former Department of Justice of a report on the domestic abuse of women by men in New Zealand, on the grounds that he was "offended" by the report's failure to address the issue of the abuse of men by women.

Section 13 of the Ombudsmen Act 1975 provides that "*... it shall be a function of Ombudsmen to investigate any decision or recommendation made, or any act done or omitted... relating to a matter of administration and affecting any person or body of persons in his or its personal capacity... "*

Before considering an investigation of the Department's decision, it was necessary to consider whether any person could be said to be affected in their personal capacity by a publication containing general information about the domestic abuse of women by men. Was the complainant's claim to be "offended" by the omission of other material from the report, evidence that someone had been "affected" in a manner contemplated by the Act?

The Chief Ombudsman's view was that it must be possible to demonstrate that the publication referred to a specific individual, or individuals in some identifiable manner, and impacted on that individual or individuals in some discernible way, before it could be said that the decision to publish the report "affected" any person in their personal capacity. As this could not be demonstrated, the Chief Ombudsman did not consider that he had jurisdiction to investigate the complaint.

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## **PERSONAL CONTACTS**

### **...FACE TO FACE WITH THE OMBUDSMEN'S OFFICE**

People sometimes wish to meet those who are directly connected with the investigative work of the Ombudsmen face to face. This may simply be to enquire generally as to what an Ombudsman does and how an Ombudsman can help them. Alternatively, it may be that they have a specific grievance that they wish to discuss with someone to see whether an Ombudsman can do anything about the matter and sometimes it is to discuss the progress of an investigation.

Unless that person lives in Auckland, Wellington, or Christchurch, where the Ombudsmen have offices, such personal contact may be difficult. To this end a regular programme of visits to various parts of the country by the Office's Investigating Officers continues to be held.

For the want of a better word, such visits are called "Clinics". They are advertised in the local press, and may also be publicised by other means.

In addition to being accessible to members of the public who may have an interest in seeing someone from the Office of the Ombudsmen, the Investigating Officers also use the opportunity to meet with Local Government officials and people who work with Citizens Advice Bureaux, from whom a number of requests are received by the Office.

During the first quarter of 1996 such visits were made to Pahiatua, Masterton, Carterton, Martinborough, Pukekohe, Dunedin and Invercargill.