

Editorial

**Too Much to Do - Too Little
Time Answering
Official Information Requests**

At busy times, often when there are urgent deadlines to meet, an official information request will arrive and be one that seems beyond the organisation's ability to meet - because of inadequate staff resources. Is that an adequate reason for delaying a response to the request?

The answer, as always, depends on the particular facts of the individual request. However, requests may not be refused simply because they relate to a large volume of information. Nevertheless, where a large volume of information has been requested an initial response to the request may, in appropriate cases, take any one or more of the following forms:

- ◆ The requester may be advised of an extension to the statutory time limit.
- ◆ The request for the information (or parts of it) may be transferred to another organisation, department or Minister believed to be more closely connected with the request and the requester advised accordingly.
- ◆ The requester may be advised of the likely charges that may be incurred if the request is to be met in full and consequently be asked whether the request could be narrowed.
- ◆ The requester may be advised that the information would not be made available in the way preferred by the requester because to do so would impair efficient administration
- ◆ A request may, in appropriate cases, be refused on the grounds that the information cannot be made available without "substantial collation or research".

It is this last possibility that sometimes causes problems in its application.

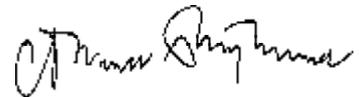
In providing for this possibility, the Act recognises logistical limits on the duty it imposes to comply with the principle of availability. Thus, although a request may be precise, and although no "good reason" to withhold the information can be seen, the Act recognises that situations may occur where the process of locating and extracting the information is of such magnitude that the "collation and research" involved, relative to the organisations actual ability to carry it out, justifies a refusal of the request. In our Practice Guidelines, Guideline No1 identifies the following factors as relevant in considering this issue:

1. The difficulty of the work involved in locating, researching or collating the information.
2. The amount of documentation to be looked at.
3. The work time involved.
4. The nature of the resources available in money, facilities, numbers and skills of personnel.
5. The effect on other operations of the diversion of resources to meet the request.

Lack of staff resources may thus be a relevant factor for delaying making information available, or for refusing a request, but by itself it is unlikely to be an adequate reason. It is a responsibility of an organisation subject to the Act to answer official information requests. It is to be expected that it will have reasonable staff resources to meet such requests. The Act, however, in recognising that practical difficulties may arise in answering requests for official information, also provides possible solutions. These should be borne in mind whenever a request is received. No response to a request should be delayed simply because the request cannot be dealt with in a substantive manner.



Sir Brian Elwood
Chief Ombudsman



Anand Satyanand
Ombudsman



HEALTH AND BUSINESS - THE NEED TO KNOW ?



The manner and scale in which health services are provided in New Zealand are matters that continue to be subject to public debate. As with any such debate, the relevant issues are best considered where there is sufficient information to allow informed opinions to be reached.

Over the last few years, the Ombudsmen have been called upon to conduct a number of investigations concerning requests for Crown Health Enterprise Business Plans. In most of these cases requests for the plans were declined outright on the grounds that the release of the information would prejudice both the commercial activities of the relevant Enterprise and its ability to carry on negotiations.

When considering the applicability of such withholding reasons the Ombudsmen have been mindful that one of the objectives of Crown Health Enterprises under the Health and Disability Services Act is to provide health services while operating as a successful and efficient business. However they have also had to consider the public interest in disclosure of information contained in the business plans of these Enterprises. Such disclosure promotes effective public participation in the making and administration of health policies. It also promotes the accountability of those officials responsible for health planning.

In each case, after balancing the competing interests, the Ombudsmen have reached the view that a limited amount of information in the relevant Business Plans did fall within the scope of the relevant withholding provisions.

Generally the information able to be withheld has included:

- financial information that is detailed enough to allow a competitor of a CHE to gain knowledge of costing structures significant to future tender bids;
- detailed (as opposed to indicative) plans for expanding, reducing or changing services. It has been considered that such information could be used by competitors to exploit the weaknesses of CHEs and target relevant services in either the tendering arena or in direct competition; and
- information relating to industrial, purchasing or sale negotiations that discloses vital elements of negotiating strategy.

Nevertheless, in each of the relevant cases the Ombudsmen have also reached the view that copies of the Plans ought to be provided to requesters, after the information falling within the relevant withholding provisions had been deleted. This resulted in the bulk of each plan being released. Disclosure in this manner has afforded protection to the genuine commercial activities of CHEs while at the same time providing sufficient information to satisfy the public interest considerations favouring disclosure.

EXPORT PROHIBITIONS? WHAT PROHIBITIONS?

In 1995 the Chief Ombudsman had investigated a refusal by the Ministry of Foreign Affairs and Trade to disclose information it held relating to the export of strategic goods from New Zealand between June 1993 and June 1994. The Ministry held the information because it monitors the export of items subject to the Export Prohibition Regulations 1953, which are administered by Customs.

Although the outcome of the investigation was that the request had been properly refused, nevertheless a question remained as to whether the Ministry accounted sufficiently to the public for its role. The Ministry agreed that further accountability for its operations in this respect was required and that it would therefore refer to these functions in its next annual report.

EXCESSIVE FISHING IN "PRIVATE" WATERS

The Ministry of Fisheries was asked for a copy of the register of fishing vessels which it maintains under the Fisheries Act. The request was made by a District Council with responsibility for administering port facilities. The Council wanted the register to help it recover unpaid berthage and wharfage fees charged under the Harbour Bylaws for vessels using the port facilities. The register contains the names and addresses of all vessel owners as well as other information about each vessel.

The Ministry refused the Council's request, relying on Section 9(2)(a) of the Official Information Act in order to protect the privacy of the vessel owners. The Council requested a review of this refusal. The Privacy Commissioner was consulted on the privacy issues involved. He considered that release of the entire register to the Council would infringe the privacy of the owners of vessels which did not use the port facilities as well as the privacy of owners whose vessels had already paid the berthage and wharfage fees due. If the entire register was released, the Privacy Commissioner considered there would be risks of :

- ❁ disclosing personal information that would be excessive for the purposes for which it was required;
- ❁ disclosing information for a purpose for which it was not obtained;
- ❁ enabling inaccurate information to be used in the making of official decisions affecting individuals as the copy of the register released to the Council would be accurate only at the date of issue.

In the Privacy Commissioner's view, these risks would be significantly reduced if the Ministry withheld the fishing vessel register itself but instead released ownership information from the register in response to specific requests from the Council naming the vessel concerned and providing dates when that vessel used the port facilities.

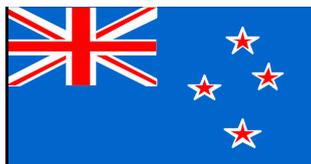
The Ombudsman shared the Privacy Commissioner's views and accepted that it was necessary to withhold the total fishing register in order to protect the privacy interests identified. He accepted however that there was a public interest in enforcing the Council's bylaws for payment of fees for use of port facilities, but this was not considered strong enough to outweigh the privacy interests of other fishing vessel owners who were either not users of the port or who had paid the relevant fees. The public interest in law enforcement could be met by specific requests focusing on the individual vessels concerned.

APPROVALS, PERMITS, AND VISAS - MINEFIELD FOR WORKING VISITORS AND OTHERS

A complaint was received from a couple who considered they had been denied work visas unreasonably by the New Zealand Immigration Service (NZIS). The couple had made a substantial investment in a New Zealand company which had adopted a development plan to build a motel and restaurant. They held visitors' permits when the company requested consent from the NZIS in Christchurch to employ them to supervise the planned development. The NZIS granted the company approval in principle to recruit the couple for a period of up to two years.

Unfortunately, the couple, whose native tongue was not English, misunderstood that they were expected to leave New Zealand at the expiry of their visitors' permits and to apply for work visas from overseas, with the result that they remained in New Zealand without realising that this was unlawful.

When this was discovered, NZIS advised them to leave New Zealand immediately, but that the approval in principle for recruitment overseas remained valid until a specified date. The couple flew to Sydney, where one of the complainants applied for a work visa pursuant to the approval in principle.



NZIS declined this application as it considered the complainant had shown a significant disregard for the requirements of the Immigration Act 1987 by remaining in New Zealand unlawfully. The other complainant, on being informed the same result was likely in her case, chose not to apply.

On investigation by the Ombudsman NZIS accepted that it should have informed the couple, (or the company in the subsequent discussions), that although the approval in principle was current if the visa was applied for overseas, the fact that they had overstayed their permits could possibly be taken into account in reaching a decision. It also accepted that incomplete and inaccurate information had been sent

by it to Sydney and that it was on the basis of that information that the decision in Sydney had been made.

NZIS advised that if its Sydney office had been in possession of all the information on the New Zealand file, it was possible a different decision could have been reached and offered to issue the couple work visas for two years. The couple accepted the offer expressing delight at being able to return to New Zealand to proceed with the development.

IMPLIED WAIVER OF PRIVILEGE ?

The following case is a practical illustration of the approach taken when questions of legal professional privilege and implied waiver arise.

A requester sought access to a local authority's legal advice regarding a proposed change to the District Plan. The local authority declined to release the information requested citing as a withholding reason the need to maintain legal professional privilege.

One of the contentions advanced by the requester in favour of release was that by stating it had taken "full legal advice" on the proposed change the local authority was representing that the advice supported its actions and had thus effectively revealed the contents of the advice and hence waived privilege. The local authority had not expressly waived privilege in this instance, but, as discussed in the editorial of the June

1996 issue of the *Ombudsmen's Quarterly Review*, waiver can also be implied from the conduct of the privilege holder, and the underlying factor is one of fairness. This was illustrated in the editorial by reference to the case of *Tau v Durie* [1996] 2 NZLR 190. The point about possible loss of privilege has been made in another recent New Zealand case as follows:

"Free and unfettered communication between solicitor and client goes to the root of the proper conduct of ... affairs ...and particularly to the conduct of litigation. But legal privilege like every other privilege carries with it obligation, and must not be abused. If it is abused it is likely to be lost." (*Equiticorp Group v Hawkins* [1990] 2 NZLR 175)

In the Chief Ombudsman's view, the simple statement by the local authority that it had taken "full legal ad-

vice" was seen as being no more than "a bare reference to a document" which the Courts have not seen as waiving privilege. The local authority's statement could not necessarily be seen as representing that the legal advice directly supported its actions. Advice may be presented in the form of a series of options, leaving the client to decide which is most appropriate.

Even if it could be said that the local authority, by stating it had taken "full legal advice" had represented the legal advice as supporting its actions, it was not clear how that representation would assist the local authority either prior to or at the public hearing of the proposed Plan change to which the advice was directed. Thus the Chief Ombudsman did not see it as unfair to maintain the privilege and concluded that the local authority had not waived legal professional privilege with respect to the documents sought.

" To Confirm or Deny, That is the Question..."

The Official Information Act recognises that there may be occasions where confirmation or denial of the existence of certain information could prejudice interests that the Act seeks to protect. Where this is so section 10 of the Act provides that the requester can be given notice in writing that neither the existence nor the non existence of the information is confirmed or denied.

There are two conditions that must be met before section 10 can apply to a request:

- (1) The information requested is of a kind to which any of the conclusive withholding grounds specified in sections 6 or 7 of the Act could apply, or to which those grounds of commercial prejudice specified in section 9(2)(b) of the Act could be applicable; and
- (2) The decision maker must be satisfied that the particular protected interest "would be likely to be prejudiced" by simple disclosure of the existence or non-existence of the requested information

Where a decision maker has issued a notice under section 10, an Ombudsman, on review, must first form an independent view on the applicability of any of the earlier sections to the requested information. If one or more of the provisions is seen as applicable, the next step is to consider the validity of the decision maker's view that disclosure of the existence or non-existence of the requested information "would be likely" to prejudice the relevant protected interest. This requires an Ombudsman, not simply to substitute the Ombudsman's view for that of the original decision maker, but rather to assess whether the original decision maker had grounds for being satisfied that the prejudice "would be likely" to occur. Unless an Ombudsman considers there were no grounds upon which the decision maker could reasonably have been satisfied that disclosure of the existence or non-existence of the requested information would be likely to prejudice a relevant protected interest, the decision would not be questioned.