

Editorial

Requests for Details about Consultants and their Fees

The increasing number of requests for release of information about consultants' fees was commented on by the then Chief Ombudsman in his report for the year ended 1992. That increase had its genesis in the extensive restructuring of central and local government and the consequent increase in the use of private consultants by public bodies.

While the incidence of relevant complaints made to our office lapsed in successive years, there has been a resurgence recently of interest in such matters. It may therefore be of help to outline the general approach we have taken to complaints under the Official Information Act and the Local Government Official Information and Meetings Act where the requested information consists of details about consultants and their fees.

In the majority of cases dealt with to date, the views reached have been that good reason did not exist to withhold information showing the total fees paid to individual consultants, along with a general indication of the nature of the work or advice involved. It has rarely been established that one of the withholding provisions in the official information legislation applied to such information.

In this context, a number of general arguments have often been raised. These arguments and the responses to them are summarised below:-

Disclosure will prejudice the commercial position of the consultants - OIA.s9(2)(b)(ii); LGOIMA.s7(2)(b)(ii)

Where it can be shown that disclosure of pricing information would be likely to reveal a consultant's pricing or marketing strategy in a competitive market, then such information is generally protected. However, the total sum paid to a consultant, along with a general description of the services provided, will rarely reveal anything of significance about a consultant's fee structure or pricing policy. There has been no evidence to suggest that the numerous previous disclosures of such information have directly resulted in prejudice to the commercial positions of any of the consultants involved.

The information is subject to an obligation of confidence - OIA.s9(2)(ba); LGOIMA.s7(2)(c) -

Information cannot be withheld simply because it might be subject to an obligation of confidence. It must also be shown that disclosure:

- “(i) ... Would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
- ... Would be likely otherwise to damage the public interest.”

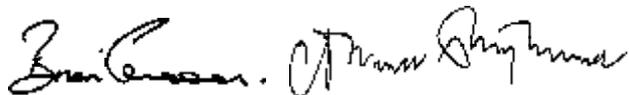
There have been cases where information on fees has been subject to a confidentiality agreement. However, Ombudsmen have rarely been persuaded that disclosure of total fees would prejudice anyone's interests. There is no suggestion that previous disclosures of consultancy fees have deterred consultants from working for public bodies again.

Disclosure of fees will set a “benchmark” and thereby prejudice or disadvantage the holder's ability to negotiate the best terms when contracting with consultants in future - OIA.s9(2)(j); LGOIMA.s7(2)(i).

These provisions recognise that it is in the public interest for central and local government to be able to carry on commercial negotiations without prejudice or disadvantage. The question to be asked, however, is whether disclosure of the information requested would be so likely to prejudice or disadvantage the organisation in the negotiations that it is necessary to withhold that information. In the majority of cases previously dealt with, we have not been convinced that disclosure of a total fee paid to a consultant would disadvantage the organisation in negotiating fees with other consultants. This is, however, distinct from information showing the structure of such a fee, where generally the information can be withheld.

Generally, we are of the view that there is a strong public interest in disclosing worthwhile information about the employment of consultants by public sector agencies. This interest is in showing how public funds and affairs have been managed - for example, the cost of consulting services, the frequency in use of consultants and the alternative of using “in house” services.

This is a point upon which the following observation was made in the case *Wyatt Co v Queenstown Lakes District Council [1991] 2 NZLR 180*: “It is fundamental to the Act that the public are to be given worthwhile information about how the public's money and affairs are being used and conducted, subject only to statutory restraints and exceptions.”



Sir Brian Elwood
Chief Ombudsman

Anand Satyanand
Ombudsman

WHAT IS A "COMMERCIAL ACTIVITY"?

What is a "commercial activity?" One of the grounds for withholding official information is so organisations holding the information can carry out, without prejudice or disadvantage, commercial activities. The Ombudsmen have turned to case law for help in establishing what makes an activity "commercial."

In *Timaru Municipal Corporation v South Canterbury Electric Power Board* [1928] NZLR 174, the then Supreme Court found that "*the purpose of profit is implied in the term 'commercial purposes.'*" Case law since then suggests this view is still the law. Although the intention to make a profit is seen as an essential feature of an activity in order that it be a "commercial activity," the same activity may be a "commercial activity" for one party but not for another.

A request was made to review the withholding of a report about the activities of a Language Institute run by a university. The institute provided English language instruction for students who paid for the cost of the learning provided. It competed for students with other such institutions in New Zealand and around the world, and had a number of contracts to supply this service to other organisations on a commercial basis.

However, the contract between the university and the other parties recorded that the institute was "not a profit-making institution." In such circumstances, was the institute carrying out a commercial activity? The question focused on the distinction between commercial organisations and commercial activities. Not every activity of a commercial organisation will necessarily be a commercial activity and, conversely, not every activity of a non-commercial organisation will necessarily be non-commercial.

The agreement completed by the university referred to the development of the institute's language offerings as "designed as an entrepreneurial activity to secure a commercial return." The contract recorded that the university's policy committee should receive regular financial statements from the Finance Registrar on the commercial activities of the institute. Thus the contract made it clear that, notwithstanding the parties describing the institute as a non-profit organisation, its language courses were identified as a "commercial activity."

The determination noted no contradiction in such a state of affairs. Charities, which are a common type of non-profit organisation, may carry out commercial activities, whether in the form of renting property, selling goods, or otherwise, to generate income to enable them to undertake their charitable work. The status of an organisation did not determine the nature of every activity it carried on.

So, the institute's language courses were deemed a commercial activity. That required two analyses - whether releasing the report would prejudice those commercial activities and whether there were any public interest considerations favouring the release of the report which outweighed the interest in withholding it. The conclusions were that there was likely to be a prejudice, and that there was no public interest which overrode that reason for withholding it.

"Workshops" not covered by OA

**Do "workshops" run by local authorities at which no resolutions are passed or decisions made fall within the ambit of the Ombudsmen Act?
The answer is - probably not.**

The news media asked the Ombudsmen to investigate the decision to set up workshops for councillors. The concern was expressed that as these workshops would not be open to the public, the news media would be unable to report on the decision-making process within the council.

An investigation was declined, on jurisdictional grounds. The decision to adopt the workshop proposal had been taken by the full council, and section 13(1) of the Act provides that the Ombudsmen may not investigate the decisions or actions of a full council.

However, the Chief Ombudsman believed it would be wrong if a local authority were to use the statutory provisions to hold workshops at which the normal business of its

meetings or those of its committees was conducted. The concept of a workshop could be used to allow the attendance and participation of council officers who would not so readily be able to participate in formal council meetings.

The provisions of Section 114F of the Local Government Act would effectively preclude the calling of a special meeting of the authority immediately following the workshop, in the event that resolutions were needed. A minimum of 24 hours notice in writing to members of the authority is a requirement for calling a special meeting, and if this were to be done by the authority before holding a workshop it would call seriously into question the status of the works hop concerned.

INFORMANTS' NAMES MAY BE KEPT CONFIDENTIAL

The general approach taken to cases where a request for an informant's name has been refused is illustrated in a matter dealt with recently. A licensed restaurant that hosted live music had been the subject of numerous noise complaints made to a territorial local authority. The city council involved had acted on these complaints and, on the restaurant's request, had released the number and precise nature of the complaints. However, a request under the Local Government Information and Meetings Act for the names of the informants was denied.

Local authorities are responsible for a range of law enforcement functions, most notably under the Resource Management Act. So, where informants' identities are at issue, the applicability of section 6(a) of the Local Government Official Information and Meetings Act must be considered.

This section applies where disclosure of the information would be likely: (a) *To prejudice the maintenance of the law including the prevention, investigation, and detection of offences, and the right to a fair trial.* There is a similarly worded provision at section 6(c) of the Official Information Act.

The approach that successive Ombudsmen have taken in cases involving the identities of informants is well established. Although each case must be considered on its merits, Ombudsmen have generally formed the view that information identifying an informant can be withheld. This is because if it were widely known that information identifying informants was to be made available, it would be less likely in future that such persons would come forward with information about possible offences, so prejudicing the maintenance of the law - including the prevention, investigation and detection of offences.

In this case, the general approach prevailed and the decision to withhold information was withheld. It was clear that in seeking to detect offences against the Resource Management Act the council placed much reliance on information received from members of the general public. Disclosure would have jeopardised this source of information.

Early Release on Parole Details May be Disclosed

The public interest in knowing criminals convicted of serious offences have been released early by their Parole Board may outweigh the consequent infringement of their right to privacy.

Information sought about four men who had been sentenced to life imprisonment for killing police officers between 1963 and 1976 was withheld by the Department of Corrections. None of the four were still in custody by 1996 and the requester's bid for information as to dates of release, details of any subsequent offending and whether they had been recalled to continue their life sentences, was rejected.

The Chief Ombudsman accepted that disclosure of the release dates would infringe the privacy of the four named men. However, the information revealed a diminution of life sentences by parole. In those circumstances, he considered there was a strong public interest in disclosure of the release dates to promote the accountability of the Parole Board and to enable the public to participate more effectively in making and administering criminal justice laws and policies. He said that in both respects, disclosing the information would "*enhance respect for the law*" and "*promote the good Government of New Zealand.*"

It was true, the Chief Ombudsman said, that there was also a public interest in the rehabilitation of former inmates and thus in certain circumstances it could be argued that rehabilitation would be prejudiced by the release of this type of information if it were widely disseminated. However, given that all four men had been released from prison more than 10 years ago, he did not consider this was a case where releasing the exact date of their release would likely prejudice their continuing rehabilitation.

Were the Department to disclose whether any individual had reoffended, that might result in a serious infringement of that individual's privacy, he said. Again, however, there was a public interest in providing certain information on that score. A statement that none of the individuals concerned had subsequently been sentenced to imprisonment or been recalled to continue their life sentence would suffice.

CONSOLIDATED INDEX

A consolidated index of articles appearing in the nine issues of the Ombudsmen "Quarterly Review" so far - running from March, 1995, to March, 1997.

The first number is the folio (year) and the second number is the issue (which quarter).

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