



Issue 11 / Autumn 2015

Welcome

We receive periodic complaints from parents of children with behavioural disabilities such as Aspergers and ADHD about how schools manage their children. Often those complaints relate to how those children are disciplined for behaviours related to their disability.

These cases are of particular significance in light of our role as part of New Zealand's Independent Monitoring Mechanism under the UN Disabilities Convention to promote, protect, and monitor progress in its implementation. The Convention includes a specific right to non-discrimination in education for children with disabilities.

In this issue we discuss a recent case by the Ombudsman in which a school acted unreasonably in expelling a student with Aspergers.

We also update you on progress in the Chief Ombudsman's investigation into OIA practices, alert you to some minor amendments to the official information legislation and Ombudsmen Act, and discuss an opinion and some case notes that have recently been published.

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Investigation into OIA practices



The Chief Ombudsman's review of selected agencies' Official Information Act processes is progressing well.

Currently we are:

- Analysing responses to our two-part survey from over 100 agencies and Ministers, and identifying good practices and areas of vulnerability or non-compliance from these responses and associated documentation.
- Preparing for on-site visits and interviews with the 12 agencies we have selected for formal review to see what happens in practice.
- Preparing our consultation with the public and stakeholders as to their experiences.

Dame Beverley was interviewed on 20 May by Katherine Ryan for Radio New Zealand's "Nine to Noon" about the review. The audio for that interview is available at: <http://www.radionz.co.nz/national/programmes/ninetonoon/audio/201755097/lack-of-understanding-to-blame-for-poor-oia-practices>

New COTA inspectors

This quarter we were pleased to obtain additional funding for our National Preventive Mechanism (NPM) role of monitoring prisons and mental health facilities under the Crimes of Torture Act 1989. The extra funding was provided in the wake of serious concerns expressed by the United Nations Subcommittee on the Prevention of Torture last year about inadequate resourcing for New Zealand NPMs.

We are currently recruiting two new inspectors to assist our Chief Inspector who has been operating singlehandedly for the last 18 months. The new inspectors will assist us in conducting more comprehensive inspections.

A link to the advertisement for the inspectors can be found here: <http://www.ombudsman.parliament.nz/newsroom/item/new-vacancy-inspector-cota-full-time-two-positions-wellington>

OIA and OA amendments



On 26 March 2015 some minor amendments to the Official Information Act, the Local Government Official Information and Meetings Act, and the Ombudsmen Act came into effect.

The changes to the official information legislation resulted from the Law Commission's review of that legislation. The key changes include:

- Explicit recognition that requests can be made and communicated in any way, including orally.
- Clarification that agencies can ask for oral requests to be put in writing if that is reasonably necessary (if the requester declines, or is unable to do so, the agency must record its understanding of the request and provide that to the requester).
- Confirmation that partial transfers of requests can be made.
- Clarification around when an amended or revised request is a new request that replaces the original one for the purpose of calculating the maximum statutory timeframe for response.

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- Confirmation that information may be released in electronic form or by electronic means (subject to the requester's preference).
 - Clarification that agencies must make reasonable efforts to locate documents before refusing a request on the basis that they do not exist or cannot be found.
 - A new function under the official information legislation for the Ombudsman to investigate complaints that an agency has failed to make and communicate its decision on a request as soon as reasonably practicable.

The key change to the Ombudsmen Act is to give an Ombudsman the ability to refuse to investigate a complaint if, after preliminary inquiries and having regard to all the circumstances of the case, an investigation is unnecessary.

A link to our guidance on the new amendments can be found here: http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/952/original/changes_to_the_oa_and_oi_legislation_-_march_2015.pdf?1427827593OIA and OA amendments

Expulsion of special education needs student



In March Ombudsman Ron Paterson released an opinion under the Ombudsmen Act about an investigation into a decision by a school Board of Trustees to expel a high school student with Aspergers.

Following an incident where the year 11 student had threatened to assault a teacher in the staff room, the Board had expelled him for "*gross misconduct*" that was "*a harmful or dangerous example to other students*" under section 14(1)(a) of the Education Act. Several strategies had been put in place to support the student in his nearly three years at the school. The incident was triggered by the student's attempt to resubmit a speech for NCEA credits.

Professor Paterson found that the school acted unreasonably in several respects.

Staff at the school had failed to take opportunities for earlier intervention and to adopt alternative handling strategies before the incident in the staff room. The Board had failed to keep adequate records of the decision making process. The decision makers had not given adequate consideration to a number of relevant factors, being the manner in which the sequence of triggering events was handled, the alternatives to expulsion, and a Memorandum of Understanding signed between the School and the student's parents in which the school had undertaken to consult the family before significant disciplinary decisions. Additionally, the decision makers had failed to give adequate consideration to the effects of Aspergers on the student's behaviour.

The Ombudsman recognised that *"school boards must strike a difficult balance, within available resources between the rights of a student with a disability to an education, and their obligations to staff and other students"*. But at the *"heart of"* the case was *"a young man with an Autism Spectrum Disorder (ASD) who was unable to complete his education in a mainstream school"*.

He stated:

"My overall assessment is that the Disciplinary Subcommittee of the Board found itself in an invidious situation but that, in moving immediately to impose the harshest penalty – in the face of unanswered questions and a complex background, and under time pressure – the Subcommittee acted unreasonably."

The Ombudsman recommended that the Board write to the student and his parents with a formal apology, attach a copy of his opinion to the student's expulsion record, and continue to review its practices – in the areas of support for students with disabilities, disciplinary processes and documentation – in light of the lessons from the case.

The school accepted the Ombudsman's recommendations.

A copy of the opinion can be found here: http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/958/original/170591_-_investigation_of_decision_to_expel_high_school_student_with_aspergers.pdf?1429670597

Wellington Regional Council's transport rate estimates



In May the Chief Ombudsman released an opinion under the Official Information Act about a decision to withhold information relating to Wellington Regional Council's transport rate estimates.

The Greater Wellington Regional Council (GWRC) periodically seeks tenders from transport operators for the provision of public transport services in the Wellington region. The provision of those services is funded by fares paid by passengers, the transport rate levied by the GWRC on local authorities, and grants the New Zealand Transport Authority (NZTA) pays the GWRC. In its 2011/2012 Annual Plan estimates of expenditure, the GWRC indicated that the transport rate would be about \$46.4 million.

To assist it in keeping accurate information about the provision of public transport services, the GWRC created a transport rating model (TRM). The TRM includes information about the amounts originally paid by the GWRC to transport operators each year, the "*Contract PA – cost*" (annual cost of providing transport services for each route), adjustments to those amounts reflecting increases in NZTA subsidies, and operators' actual revenue for routes they service.

The complainant had requested certain background calculations used to create the estimated expenditure including the TRM. The GWRC had refused to release some of the information under section 7(2)(b)(ii) of the Local Government Official Information and Meetings Act.

The Chief Ombudsman formed the opinion that release of the information would unreasonably prejudice the commercial position of transport operators for the purposes of section 7(2)(b)(ii). For example, release of the "*anticipated revenue*" in the "*price proposal*" forms would be likely to reveal transport operators' strategies in the last tender round and

also in future tender rounds. This would impact adversely on the ability of those transport operators to participate competitively in future tenders for transport services in the Wellington region and the ability of the Council to get the best deal for ratepayers for these services.

Dame Beverley held that there were no public interest considerations that outweighed the need to withhold the material. Information that was publicly available, or available as a result of the request, enabled submitters on the GWRC's Annual Plans to make informed submissions on matters relating to the cost of provision of transport services.

A copy of the opinion can be found here: http://www.ombudsman.parliament.nz/ckeditor_assets/attachments/352/request_for_information_concerning_transport_rate_estimates_in_wellington_regional_council_s_draft_20112012_annual_plan.pdf?1432858229

Case note – Advice on Kim Dotcom's applications to invest in land in New Zealand



In May Ombudsman Ron Paterson published a case note about an investigation under the Official Information Act. The Campaign Against Foreign Control of Aotearoa (CAFCA) had complained about the decision of the Overseas Investment Office (OIO) to refuse its request for information deleted from the file relating to Kim Dotcom's applications for consent to invest in New Zealand.

The Ombudsman found most of the deletions were justified, but queried the basis for withholding parts of the OIO's advice to Ministers on the applications. The advice had been withheld in order to maintain legal professional privilege (section 9(2)(h) of the OIA) as well as the effective conduct of public affairs through the free and frank expression of opinions between Ministers and officials (section 9(2)(g)(i) of the OIA).

After considering the Ombudsman's comments in consultation with the Crown Law Office, the Attorney-General agreed to waive privilege. The information was released and the complaint was resolved. The case note contains some helpful information about how the Ombudsman interprets and applies the legal professional privilege and free and frank withholding provisions of the OIA. It also contains discussion about the public interest in people knowing how government decision makers are interpreting and applying the law to make decisions that affect them personally.

A link to the case note can be found here: http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/971/original/request_for_advice_to_ministers_on_applications_under_the_overseas_investment_act.pdf?1432757081

Case note – compensation for passport processing error by Customs

In May Ombudsman Ron Paterson published a case note about the decision of New Zealand Customs Service to offer the complainant an *ex gratia* payment of \$200 for causing him to miss a flight to Australia due to minor water damage to his passport.

The complainant, who had been successfully checked in by his airline, was prevented from boarding his flight by Customs after it rejected his passport because it appeared to be damaged by exposure to water. He incurred over \$1143.13 in costs in obtaining an emergency passport, last minute flights, and overnight accommodation.

Customs acknowledged that its actions were inconsistent with its procedures, that its officials omitted to test the passport in an electronic reader and that the responsibility for whether a passport is acceptable for travel purposes rests with the airline. It had offered the complainant an *ex gratia* payment of \$200.

The Ombudsman formed the provisional opinion that the *ex gratia* payment was unreasonable because it did not cover the financial loss suffered by the complainant, and that the complainant was owed an apology in light of the stress caused by the incident.

Following the provisional opinion Customs reviewed its position and agreed to an *ex gratia* payment covering the full amount of the financial loss caused and apologised in writing to the complainant.

In light of the remedial action taken by Customs, no recommendation was necessary.

A copy of the case note can be found here: http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/977/original/adequacy_of_ex_gratia_payment_to_remedy_mistake_by_customs.pdf?1432761203
