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Editorial

An Ombudsman's Investigation is a Remedy of Last Resort

An Ombudsman's investigation is a remedy of last resort. Where alternative procedures are available, a complainant will generally be expected to have exhausted such other avenues before seeking the intervention of an Ombudsman.

This is reflected in S17(1)(a) of the Ombudsmen Act, 1975, which confers a discretion on Ombudsmen not to investigate, or to discontinue an investigation, where it appears that there is an adequate remedy under the law or administrative practice to which it would be reasonable for a complainant to resort.

We are often asked to review an organisation's decision to refuse to release information requested in association with judicial proceedings. In these circumstances, if the discovery procedure is also available to the requester, Ombudsmen have traditionally taken the view that this is an alternative remedy under the Official Information Act.

In a recent investigation, a request made of a third party for information relating to High Court proceedings was refused on the grounds that under S9(2)(h) of the OIA it was legally professionally privileged. The information had not been included with the documents filed in the court and, as a consequence, the discovery procedure was not available to the requester.

Following notification of the complaint, the organisation advised that the documents at issue had subsequently been included in the supplementary list of documents filed in the court and, as a result, they were now subject to discovery procedure.

Our general approach is that where information is sought for legal proceedings which have been issued, it is appropriate for the parties to follow the normal court procedure on the production of documents necessary for those proceedings. This enables the court to determine questions such as relevance, admissibility or privilege that may arise.

In such circumstances, it would be inappropriate for an Ombudsman, in the context of an official information investigation, to prejudge what a court may be called upon to decide in the course of proceedings.

A court's decision on the issues before it may be of great relevance to any investigation undertaken by an Ombudsman because the court, unlike an Ombudsman, has the power and function to determine both fact and law. Consequently, it would also be inappropriate to progress an investigation while relevant litigation, to which the complainant is a party, may resolve some of the issues an Ombudsman is being called upon to consider.

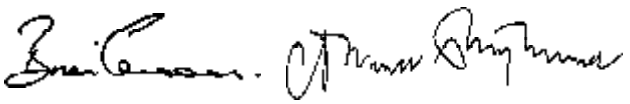
If at the end of the day there are matters that cannot be, or have not been, resolved through the process of litigation then, clearly, it would be open to a complainant to approach us again so that the unresolved matters may be addressed.

This approach is consistent with the one that met with the approval of the Court of Appeal in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, where access to personal information by a defendant about himself was in issue. In that case the court had raised certain concerns if a defendant sought an official information investigation by an Ombudsman of a Police refusal of information. It questioned counsel for the then Chief Ombudsman about what would happen.

The President of the Court of Appeal observed -

> *"We raised these matters with counsel for the Chief Ombudsman and received in response an indication that if effective court procedure exists an Ombudsman would exercise his discretion under S17(1)(a) of the Ombudsmen Act, 1975, to refuse to investigate a complaint 'if it appears to him that under the law or existing administrative practice there is an adequate remedy or right of appeal … to which it would be reasonable for the complainant to resort.'"*

The court accepted this as appropriate. There appears to be no reason to believe that a different approach should be taken in cases where the information is not personal information about the requester.



Sir Brian Elwood
Chief Ombudsman

Anand Satyanand
Ombudsman

NAMES ON A LIST NOT NECESSARILY PUBLIC INFORMATION

Releasing the names of people listed on a database may infringe their privacy.

A request was made for the names of individuals listed on a Crown Company Monitoring Advisory Unit database of potential appointments to the boards of Crown companies. It was declined under S9(2)(a) of the Official Information Act, which protects the privacy of individuals.

The database in question was developed to assist CCMAU in recommending suitable candidates for Crown company directorships. It includes about 1,300 names of individuals willing to be considered for future appointments. Every individual listed has confirmed their interest in being considered by submitting their CV and completing a database form.

The requester argued that a person's name was not personal information about an individual, release of which would be likely to infringe their privacy, but the Chief Ombudsman disagreed.

When someone's name is linked to other information and that linkage tells something about that person - in this case revealing that the individuals named are considered to be potential appointments to the boards of Crown companies, and have completed the relevant application process - then a privacy issue was raised.

The information at issue was clearly personal information about individuals, who had submitted their names for consideration and had a reasonable expectation that such information would be kept confidential until they were appointed.

The requester also maintained that there was a strong public interest in releasing the database to ensure that there was no discrimination against certain groups of people. Such public considerations were considered to be best met by appropriate public scrutiny of the appointments to specific directorships, rather than releasing the names listed on the database, many of whom may never be appointed.

A DEVICE, BUT NOT AN EXCUSE

A number of complaints have been received that Ministers, departments and organisations are refusing to provide information when requested - on the grounds that it would be made available *"shortly"* - while giving no date of intended release.

Section 18(d) of the Act is sometimes relied upon in this context. It provides that a request made in accordance with Section 12 of the Act may be refused if *"the information is or will soon be publicly available."* But this provision is not stated in the Act to be a *"a good reason for withholding information."* It is simply authority for refusing a request made under Section 12 in particular circumstances - for example, because release of the information is imminent or the information at issue is presently being printed, so that there are difficulties in providing it at once.

In previous instances it has been considered good practice to provide the requester with the specific date of release or with details of the perceived difficulty in meeting the request.

Given that the principle of availability set out in Section 5 requires that *"information shall be made available unless there is good reason for withholding it"* and that Section 18(d) is not *"good reason,"* its use as a ground for refusal of a request should not undermine any of the purposes of the Act which are set out in Section 4.

If refusal of information relying on Section 18(d) has the effect of preventing effective participation in the making and administration of laws or policies where the Act provides no good reason for withholding the information, it may be seen as being inconsistent with the purposes of the Act.

Section 18(d) may be of limited used when the real reason for withholding can be found in other provisions of the Act. The section generally provides a limited reason for declining access to information which *"is or soon will be publicly available."*

NEED FOR CONFIDENTIALITY CAN OVERRIDE RIGHT TO KNOW

A council's refusal of a reporter's request for access to mid-term appraisals of its mayor, deputy mayor and committee chairpersons has been upheld. Material supplied to a council in confidence will not necessarily become available.

Appraisals of the deputy mayor and committee chairpersons were undertaken to allow constructive feedback on performance. An appraisal of the mayor was included at the mayor's request. The appraisals were also to identify any development needs and to give individuals background on their performance.

Both the process and costs had been publicised but the council considered the results were for the use of the individuals concerned only and it had been assumed by those involved that the results were to remain confidential.

Instructions from St. Paul

A complainant wrote to the Chief Ombudsman objecting to the preliminary assessment he had received as being founded in law but not in equity.

"May I suggest that you read again Paul's Letters to the Romans and Galatians … Grace is our primary order and law merely the order that acts as a backstop to it. It would be better to end our days in support of all that for which … Christ died … the transition from law to grace in our inter-human relationships. I guess if you fail in this task your entire life's work will have been a waste of time."

Appropriately for the level of scholarship the letter revealed, it had been a complaint against a university.

The question for the Ombudsman was whether Sections 7(2)(a) and 7(2)(c) of the Local Government Official Information and Meetings Act provided ground for withholding the information. He was satisfied that they did because the appraisals concerned matters of personal privacy, and that disclosure would be likely to prejudice their co-operation in any future appraisals.

The countervailing public interest in ratepayers knowing how councillors rated their political leaders was acknowledged but did not outweigh the public interest in the council being able to conduct such exercises in the future which might help improve its performance.

Reasonable Assistance Always Required

The requirement in S12 of the Official Information Act for *"due particularity"* in a request for official information must be subject to the requirement in S13 of the Act on every Minister, Department and organisation to give *"reasonable assistance."*

There have been a number of cases referred to the Ombudsmen where broad requests for official information have been declined because of the lack of *"due particularity."* The requirement in S13 seems to have been overlooked.

To give *"reasonable assistance"* requires more than stating that a request is not specific enough. In many cases, requesters simply do not have enough knowledge of the precise nature of the information they are seeking, or the form in which it may be held, to allow them to be more specific.

The Ombudsmen consider that, in view of the obligation under S13 to give *"reasonable assistance,"* the holder of official information should contact the requester to see if the request could be clarified so that the information could be specified with *"due particularity."*

No Instalment Payments for Traffic Offence Fees

A Council refused to accept a part payment of an infringment fee for running a vehicle without a current Warrant of Fitness, on the grounds that it had no power to do so.

The complainant had sought to pay the fee over time by a number of instalments. She considered the Council's refusal to accept payment in this way was unfair and unreasonable.

But the Council was right. Under the Summary Proceedings Act, payment in full of an infringement fee for an offence must be made not later than 28 days from when the infringement notice was served. If due payment is not made, a reminder notice may be issued, and if payment is not made within 28 days of that, the Council may refer the matter to the District Court.

District Courts may make orders allowing payment over time, but local authorities do not have this power.

However, the Chief Ombudsman did agree with the complainant that Council infringement notices and related documentation should explain clearly why the Council is unable to accept payment by instalments. The Council has promised that in future its notices will do this.

What if the Minister is no longer a Minister?

The departure of Neil Kirton as Associate Minister of Health raised questions about whether information held by him as a Minister still qualified as official information when he was no longer a Minister. He had refused a request for access to information while still Associate Minister.

There is a well-established convention following a change of Minister after a decision to refuse a request for information was made.

First, it is necessary to establish whether the new Minister holds any of the information sought by the request; second, if so, whether the new Minister also considers the information should be withheld.

Information held by the outgoing Minister may not necessarily have been passed on to his successor. It might be that the former Minister took the information with him/her. In that case, it would no longer be *"official information"* as defined by S2 of the Official Information Act, namely any information held by *"a Minister of the Crown in his official capacity."*

The Ombudsmen in such circumstances may not have any jurisdiction to investigate and review the matter.

The difficulty can be addressed by an approach to the replacement Minister, when appointed, asking whether any relevant information falling within the scope of the request is held and whether they adopt the original decision to refuse the request.

PUBLIC INTEREST AND PRIVACY - BALANCING COMPETING INTERESTS

There is often conflict between the right to privacy and public interest in disclosure. Even when privacy does require the withholding of some information, it need not be all the information or even large parts of it. The public interest must outweigh the right to privacy before public interest in disclosure can prevail.

This issue arose recently when a requester asked for a copy of a psychiatric report on a man who had been convicted of murdering his girl friend. Although much of the detail of the case was reported in news media coverage of the case, particularly in the Police evidence, the psychiatric detail was not.

On the first approach of the requester, parts of the psychiatric report were released but substantial parts of it were not - on the grounds of privacy. The requester then approached the Ombudsmen.

The Ombudsman decided, and the Privacy Commissioner agreed, that very little of the report needed to be withheld. The parts that were withheld included the identity of staff involved in compiling the report and the names of people associated with the victim. The Ministry of Health agreed and, with those exceptions, the full report was released.

The public interest in accountability was promoted substantially by disclosing the detailed findings of such reports, the Ombudsman said. Details of background personal information could often be withheld without detriment to the disclosure of the findings.