Volume 3, Issue 4. December 1997
ISSN 1173-5376

Editorial

Protection of Privacy Under the Official Information Legislation

For many public sector agencies subject to the Official Information Act, 1982, or the Local Government Official Information and Meetings Act, 1987 and the Privacy Act, 1993, requests for personal information continue to cause concern. Quite apart from the initial issue of which Act applies, the requirement to consider, in certain cases, whether public interest considerations favouring disclosure outweigh the need to protect personal privacy is often difficult.

In respect of official information, where individuals seek access to personal information about themselves, the Privacy Act applies; where a request is for personal information about another person, the official information legislation applies.

S9(2)(a) of the OIA and S7(2)(a) of LGOIMA both recognise that in certain circumstances information may need to be withheld to protect personal privacy. However, each case must be considered on its merits. There is no protection under the official information legislation for personal information as an exempt class or category. Requests for information which relate to an identifiable individual are likely to raise privacy issues which may require consideration. Such requests can only be refused so as to protect the privacy of natural persons, if the requirements of the two sections cited are met.

In summary, where a public sector agency is concerned that withholding certain information is necessary to protect personal privacy, the agency must:

- Identify the actual privacy interest requiring protection;
- Assess the strength of the privacy interest in the circumstances of the particular case;
- Identify any considerations favouring disclosure of the information in the public interest;
- Assess the relative strength of such considerations favouring disclosure; and
- Consider whether, in the circumstances of a particular case, they outweigh the need to withhold the information to protect personal privacy.

A common mistake made by public sector agencies has been to assume that simply because the information requested relates to an identifiable person, then the information needs to be withheld to protect that person's privacy. That is wrong. An individual may well consent to disclosure or the information may already be available publicly. The information may be about a person but be of such a nature that no privacy interest arises.

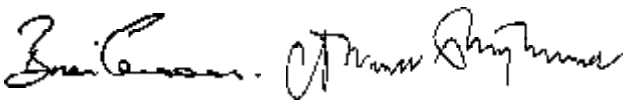
A second common mistake is to assume that the need to protect privacy is equally strong in every case. The strength of the privacy interest attaching to particular information can vary from case to case, depending on factors such as the nature of the information, how and by whom it was generated, who is making the request, and the reasonable expectations of the person concerned about how it is to be used.

In addition, it is important to note that while information privacy principle 11 in the Privacy Act identifies certain exceptions to the general principle that agencies holding personal information should not disclose it to another party, those exceptions are not exhaustive of all considerations that may favour disclosure in the public interest in a particular case.

Similarly, "*public interest*" considerations favouring disclosure in a particular case arising under the official information legislation may go wider than simply the "*accountability*" or "*public participation*" referred to in s4 of the OIA or LGOIMA.

Finally, the holder of the information (and the Ombudsmen on review) are required to make a judgement in the circumstances of the case at hand. Where a valid privacy interest requiring protection exists, the issue under the official information legislation is not simply whether there are nevertheless public interest considerations favouring disclosure, but rather whether those considerations outweigh the need to withhold.

So long as the decision-maker has made reasonable efforts to identify all relevant factors and has considered them in good faith, release of official information under the official information legislation will not breach any provisions of the Privacy Act simply because someone else might prefer a different conclusion.



Sir Brian Elwood
Chief Ombudsman

Anand Satyanand
Ombudsman

A Tale of Woe

Some stories have no fairy-tale ending. A superannuitant had no joy after borrowing money to pay a painter.

She had borrowed money from a relative to pay for work done by a painting contractor, because of the delay in funds being made available to the contractor from the Income Support Service on an approved advance for home improvement.

The superannuitant had been under pressure to pay for the completed work – hence the approach to a relative – and approached the Income Support Service to arrange for an advance to be paid to herself or to her relative, rather than to the contractor.

She was advised that a cheque had already been made out by Income Support to the contractor and lodged for deposit in the contractor's bank. It was arranged that the contractor would pay the superannuitant the funds after the Income Support Services cheque had been cleared into his own personal account.

She then heard that the contractor had left the district, so returned to Income Support Services to have the cheque cancelled. Some days later she was advised that the cheque could not be stopped because it had already been credited to the contractor's account.

A complaint was lodged under the Ombudsmen Act, on the basis that sufficient notice had been given by the complainant to the Income Support Service in order to have the cheque stopped. The cheque had been lodged on Monday and the superannuitant had sought its cancellation the following Friday.

Thinking she had at least seven days in which to have the cheque stopped, she considered the Department had not acted quickly enough. On investigation it was found that the cheque had actually been credited to the painting contractor's account two days after it had been lodged with the bank. The request for cancellation had been made too late.

A commonly-held perception as to the length of time in which a cheque may be cancelled – within seven days – was wrong.

The superannuitant's situation was indeed unfortunate. The Chief Ombudsman held that the Department had not acted inappropriately, and indeed had told the contractor of his responsibility to repay the complainant.

By this stage the contractor was himself on a benefit and could not repay the complainant. Resort to the Ombudsmen could not resolve an obvious injustice.

Care Needed When Putting Conditions on Building Consents

Local authorities need to exercise care when imposing conditions on building consents. A property owner complained recently about a city council's requirement for her to install a new vehicle crossing.

The background to the matter was that another party had obtained a subdivision consent allowing him to cross-lease a property for two flats. One of the conditions of the consent was that the existing vehicle crossing be replaced.

This condition had not been met when the complainant bought one of the two cross-leased areas. The subdivider kept the other area.

The complainant subsequently applied for, and was granted, a building consent to construct a building on her portion of the property. One of the conditions of the consent, however, was that a new vehicle crossing be constructed. In other words, the earlier resource consent condition was duplicated on the building consent.

The complainant did not comply with the building consent condition, and the council undertook the work itself. The cost was subsequently held against a bond paid by the complainant's builders when the consent was issued.

There was no doubt that the council could impose a condition requiring the installation of a new crossing when issuing the resource consent for the subdivision. S108 of the Resource Management Act provides that, subject to limited exceptions, a resource consent may be granted on ***"any…condition that the local authority considers appropriate."***

However, the situation with the building consent was not as clear. In particular, if there had been no waiver or modification of the building code, a territorial authority may impose on a building consent only such conditions as it is authorised to impose under the Building Act and the Building Regulations.

The council was asked to identify its authority for imposing the condition, but concluded of its own accord that the condition imposed on the building consent was invalid.

It consequently changed its standard practice of automatically duplicating conditions of subdivision or resource consent on related building consents. It did, however, reserve its right to advise applicants for building consents of any outstanding conditions of resource consent on relevant properties.

Building Plans Not Always Confidential

A requester asked to inspect and copy the building plans lodged for his neighbour's new dwelling. The local council refused to allow this on the grounds that the owner had advised that the plans and specifications were to remain strictly confidential. S.27(3) of the Building Act, 1991, as follows was in point:--

> *"Subject to the Local Government Official Information and Meetings Act, 1987, [and to Section 23F(2) of this Act], every person shall have the right to inspect the information referred to in subsections (1) and (2) of this section during ordinary office hours, other than any plan or specification that the person who submitted it, the owner, or any subsequent owner has marked as being confidential because of the need to safeguard the copyright of the plan or specification, or because of any requirements of the owner of the owner of the building relating to the security of the building."*

The basis for relying upon the Building Act for withholding information has to be made out, given that s27(3) is subject to LGOIMA. In this case, both the council and the owner considered that the plans should be withheld to protect the owner's privacy.

While it was accepted that building plans can be considered as involving privacy considerations, in terms of s9(1) of LGOIMA, the interests in withholding must be weighed against any countervailing public interests that favour disclosure.

The requester had previously viewed an earlier set of plans for the building and had been able to advise the Council that they did not comply with the operative District Plan – an example of effective public participation.

In this case a public interest was identified in disclosure of the information requested as contributing to the effective participation of interested parties in the building consent process.

S27(1) of the Building Act requires territorial authorities to keep information reasonably available which is relevant to the administration of the Act "to enable the public to be informed of their obligations and to participate effectively under this Act." There is therefore a statutory recognition of public interest in such information being made available.

An issue developed over the availability of the interior layout plans and the exterior layout of the building. The Privacy Commissioner, with whom an Ombudsman is required to consult when privacy is advanced as a reason for not making official information available, identified an owner/resident's privacy interest in internal layout plans.

He distinguished between exterior and interior plans, the latter having implications for personal safety. For example, the location of bedrooms and amenities could assist surveillance of people in the dwelling when it was erected.

The Ombudsman, considered the matter from a somewhat wider perspective because interior plans could effect a building's compliance with the District Plan. For example, the location of kitchen and bathroom facilities might lead to the categorisation of a building as "a self-contained unit," with planning consequences. Each case should be considered on its merits.

The requester advised that there was no interest in the interior plans, and sought only the site plan and external dimensions of the building. The complaint was resolved by the Council providing the exterior plans to the requester.

A Question of Charges and Fees

Although there are constraints on an Ombudsman's jurisdiction to investigate complaints about setting charges and fees when decisions about such costs are made by the council as a whole, there are cases where an Ombudsman can appropriately consider the level of fees actually charged.

The issue arose from a complaint by an applicant for resource consent against charges and fees that had been made by the Canterbury Regional Council. The applicants had been asked to pay an initial fee set under the authority conferred by S36 of the Resource Management Act, 1991. The Council later sought to recover added charges because the initial fee set was insufficient to enable the Council to recover actual and reasonable costs incurred.

In *Wellington RC v Aifric Developments Ltd* [1996] NZRMA 380, the High Court, on appeal from the Planning Tribunal, held that S36(3) of the RMA empowers councils to impose additional charges related to the "receiving, processing and granting" of a consent application.

It therefore follows that a council has the statutory authority to recover actual and reasonable expenses incurred and no specific resolution of the council is necessary to authorise any reasonable charge made over and above the initial fee.

However, the complainant was aggrieved that the actual cost was more than the fee which he had originally been asked to pay. He had been given no warning that the final fee might be higher than the initial fee.

While the complaint could not be upheld because of the statutory powers vested in the Council, the investigation disclosed the need for Councils to advise applicants for resource consents the likely actual cost for processing such applications, and the rights which exist to object to the charges imposed.

Common Sense v Letter of the Law

An infusion of common sense into a problem can often save time and heartache. This was the case when a mother sought information held by the Department of Social Welfare on her 15 and 16-year-old daughters.

The Department refused, relying on s9(2)(a) of the Official Information Act - that disclosing the information would be a breach of the daughters' privacy. The mother complained to the Ombudsman, who wrote to the daughters to ascertain their views.

Both daughters responded and said they had no concerns with the information being released, and were happy for their mother to get everything on their files. Once the Department had been advised of this, it agreed to provide the information to the mother.

When organisations propose to refuse access to information on the grounds provided for in s9(2)(a), an approach to those whose privacy is sought to be protected, before refusing the request, may indicate that the reason to withhold is not justified. The person affected may have no objection to the release of the information.

CHRISTCHURCH OFFICE CHANGES

Trevor Dawson has retired as Assistant Ombudsman based in Christchurch, to take up an appointment as advisor to the Ombudsman Commission in Papua New Guinea.

Robin Wilson has been appointed Acting Assistant Ombudsman in the Christchurch office.

Writing Rongs - Some Christmas Cheer

A recent review of some of the office records revealed some fascinating derivatives from that Swedish word "Ombudsman." Communications have arrived, eventually, addressed not surprisingly to the 'Omnibusman.'

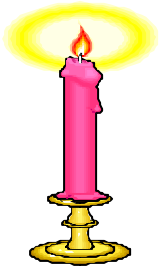
Some came to the confused but politically correct 'Onwards Person' or the 'Office of the Ombudswoman.' Still, if she missed the office being renamed, 'Your Honour Sir Nadja Tollemache' had her supporters for high honours. One correspondent got the constitutional position right, at least, by writing to 'The Hon Busman (Elected by Parliament).'

Another believed Sir Guy Powles suffered from status confusion, writing to 'The Secretary, Sir Guy Powlas, House of Lords.' Some apparently thought the Office enjoyed a larger and more diverse staff than is the case – one writing to 'The Manager, Parks Department, Office of the Ombudsman.' Could an 'Ombswoodsman' see the forest for the trees?

One thought Sir George Laking was a cool Jamaican – an 'On Badsmon' – while others, perhaps State servants, distrusted 'Colonel Powles' and Sir John Robertson as being 'Ambushmen.' There were some who saw a promising future for an 'Onwardsman,' others who anticipated the 'OdBusman's' future in public transport, or the 'Od Goods Man's' in pre-loved furniture.

Yet more appreciated the integrity of the 'Omgoodsman,' the superlativeness of the 'Ombestman,' and the collegiality of the 'Onboardsman.' The 'Ombudisam' and 'Onbassum' have a more oriental than Nordic ring.

More personally, Sir Guy was a 'Pal' to one, conducted 'Polls' to another, and was a 'Pole' to others, but surely not 'Sir Gay,' 'Sir Goy' or 'Sir Guy Fawkes.' 'Sir Brain Elwood' (an intelligent entomologist?) was an 'Onbugsnam.' Anand Satyanand, perhaps confused with the the tv-advertised producer of Ceylonese tea, received one communication containing a request for 'Tea for Two, Two for Tea and no suger please.' In a confusion not only of tasks but of offices, Judge Satyanand has also been addressed as 'the bonking Ambudsman.'



Even the personal appearance of the 'Oubaldsman' has not been safe. Foreigners not aware that New Zealand has two official languages have sought ' Mr Tangata' – beguiled by the Maori name on the Office's letterhead.

Merry Christmas!