



The role of Ombudsman in monitoring integrity systems: a report of the first 6 months

Speech by Chief Ombudsman Judge Peter Boshier to Transparency International Leader's Integrity Forum, 13 July 2016

I have been asked to speak to you on the role of the Ombudsman in monitoring integrity systems. As you are aware, the theme of today's forum is the role of information in generating transparency. The Official Information Act, and the Ombudsman as the review mechanism under that Act, both have a significant part to play in this.

Today I am going to cover the purposes and principles of the Official Information Act, and its constitutional role in our New Zealand democracy. I am then going to discuss in more detail what I consider is working well and what is not working so well, both in terms of the way the Official Information Act is applied by your agencies, and the work that is being done by my own Office. I then want to finish by giving you an indication of my future direction for the Ombudsman, and what this means for you.

Purposes and principles of the Official Information Act

The Court of Appeal has described the Official Information Act thus:¹

...the permeating importance of the Act is such that it is entitled to be ranked as a constitutional measure.

This is made clear when you consider the purposes of the Act. One key purpose is to progressively increase the public availability of information, to:

- enable more effective participation in law making and government processes;
- promote the accountability of Ministers and officials; and
- enhance respect for the law and promote the good government of New Zealand.

This purpose is underlined by the central principal of availability that governs the Act. This principle is that when a request is made, *'the information [must] be made available unless there is good reason for withholding it'*.

¹ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 391.

However, the Act does also recognise a need for balance. Another purpose of the Act is to *‘protect information to the extent consistent with the public interest and the preservation of personal privacy’*. The interplay between these competing purposes of availability and protection is most stark in the application of section 9 of the Act, where agencies are required, if they identify a harm in release of the information, to also consider whether there is nevertheless a stronger public interest in making it available. A key feature of New Zealand’s Act, and where it differs from some freedom of information regimes overseas, is that rather than considering the type of information that has been requested, the Act is based around a judgment call as to the harm that can be expected to arise from release of the information, and consideration of ways to mitigate that harm while still making information available as far as possible and in the public interest.

The essential question that must always be asked when an information request is received is therefore not *‘Why should we, or how can we, withhold this information?’* but *‘How can we quickly and responsibly make a good decision to release as much information as possible?’* Agencies should have nothing to fear from releasing official information, when that is done following a principled application of the tests set out in the Act. Releasing information, whether proactively or in response to official information requests, can help to promote public understanding of decisions that are being made, as well as enhance the quality of those decisions in the first place.

Agencies must approach official information requests from the outset as part of their core business. There is an inherent cost-benefit in getting it *‘right the first time’* in dealing with requests, and thus avoiding the need for prolonged discussions and reconstructions of events, or intervention by the Ombudsman. I thank you as Chief Executives for being here today and leading from the top. However, I also expect you to ensure your Official Information Act obligations are effectively resourced within your agencies, and that the Act is respected by your staff as an important transparency measure in an effective functioning democracy.

With the Act’s emphasis on *‘progressively’* increasing the availability of information, it must also be recognised that more, not less, information can be expected to be released over time. Indeed, many of the information requests made and agonised over in the early days of the Act, such as for details of Chief Executive salaries, are now part of the usual proactive disclosure regime in this country. The more information that is proactively released in a well-planned and executed way, the less burdensome responding to official information requests will be.

What is working well and not so well—agencies

In terms of what is working well and not so well in the general environment, the most detailed insight currently available is the report by former Chief Ombudsman Dame Beverley Wakem on central government agencies’ compliance with the Act. Her report was released on 8 December 2015, two days before I took Office, and was the most in-depth review of the Act’s operation ever undertaken by an Ombudsman.

The review covered 5 key areas that can influence the effective operation of the Act within central government agencies:

- leadership and culture;
- organisation structure and capability;
- policies, systems and resources;
- performance monitoring and learning; and
- current practices in dealing with OIA requests.

Among the key findings was that overall, agencies are compliant with the Act and government officials working within agencies have a genuine desire to ensure they are compliant. It is clear that the Act has encouraged greater openness and transparency about the work of government than existed before its introduction, and has increased the ability of people to participate in the making and administration of New Zealand's laws and policies.

However, for requesters seeking information about contested policies or activities, many agencies' processes render them vulnerable to not complying with the law—in terms of the content of the responses, and the time taken to respond.

A need was identified for greater leadership, and clear public statements from Ministers and Chief Executives about their expectations of compliance with the Act, and more generally on the promotion of openness and accountability, and enhanced public engagement.

In addition, a need was identified for better staff training in the operation of the law, as well as sufficient staffing and adequate systems to deal with information requests.

It was also stated that we would like to see agencies being smarter and more proactive in the release of information, and to review their websites to make it easier for people to find information and make requests.

What is working well and not so well—Ombudsman

In terms of what is working well and not so well in my Office, the first thing I should do is set out some basic facts and figures.

In the 2015/16 year we received 12,590 complaints and other work. This included 1,338 formal official information complaints, as well as a further 533 official information enquiries from members of the public. In recent times, there has been a steady increase in work coming to the Ombudsman, with a 44% increase in 2015/16 as compared to 2010/11.

As well as managing the complaints that we receive, we have been increasingly taking steps to undertake more general interventions to investigate significant and systemic issues, review and monitor compliance and good practice, and provide advice and guidance, with the aim of contributing to wider administrative improvement in the state sector.

In this respect, as well as the review undertaken by Dame Beverley Wakem of central government agencies' official information practices, in the 2015/16 year we responded to over 200 requests from agencies seeking our assistance in applying the official information

legislation and developing their internal practices, provided 29 training sessions to agencies, and published 37 new guidance materials.

In particular, this year saw the launch by me of a series of comprehensive new guides on the official information legislation, designed to assist both agencies and requesters. This is an ongoing project, with our early focus on publishing guidance in relation to processing requirements now moving to a focus on developing guidance on key-interest topic areas. The most recent guides published were on the public interest test and on charging for the release of official information.

Coming in to this role, I was impressed with the dedication of my staff and the high quality of analysis and engagement that they strive to achieve, across the board. However, it is clear that we have struggled with the record numbers of complaints and other work we have been receiving. I know there is frustration out there with our ability to manage all complaints in a timely manner. Our Ombudsmen Act work is in better shape, but there is room for improvement across the board, with 91% of Ombudsmen Act complaints and only 75% of official information complaints completed within 12 months in 2015/16, and a continuing backlog of aged complaints.

My vision for the future and how I will get there

So what am I doing to change things for now and in the future? Hot off the press is my [Strategic intentions](#) document for 2016-2020, which can be accessed on our website. I have set out in there my new targets. These include, within the next 3 years, to eliminate the backlog of aged complaints and to deal with the vast majority of new complaints (70%) within three months, and all complaints within 12 months. Overall, I want my Office to be an organisation of excellence.

I have received specific funding from Parliament for the next 3 years for an additional team to target the aged complaints. I am bringing in experienced and seasoned operators to work in that team, and to engage with you all in a very flexible and pragmatic way to deal with these complaints.

I can advise that we are already part of the way there! My staff have worked very hard over the last 6 months to start turning the ship around, so that while there were over 650 complaints (and growing) over 1 year old as at the point I started in December 2015, that has now reduced to 587 complaints over 1 year old today. I am determined to continue this momentum and eliminate the backlog entirely.

My model will also require an increased focus by existing teams on early resolution opportunities and flexible investigation practices. I am currently augmenting our procedures to gain maximum efficiency, including in workflow practices, targeted staffing resources, improved stakeholder engagement and better use of technology. Many of you will be aware of my recent decision to communicate with you by email rather than snail mail. This is just one handy example of a host of measures I am identifying to quicken our pace.

However, I cannot go on this journey alone. I will be increasingly looking to you, as the leaders of your agencies, to promote to your staff the development of flexible engagement between us

so that we can resolve complaints as far as possible, and with a minimum of work, fuss and bother. Indeed, for some agencies that we deal with on a more frequent basis, I may well be approaching you to set up appropriate memoranda of understanding in that respect.

In terms of the more general interventions by my Office, we will be continuing our programme of delivering advice and guidance to agencies, with a key guide currently under development on a model protocol for agencies in consulting with Ministers on official information requests. We will also continue to provide a training service for agencies on request, and in out years I will be looking to take this to another level through e-learning initiatives.

I will also be using additional funding I have received from Parliament to focus a new team on reviewing and monitoring the compliance and good practice of agencies in the official information area, including the development of an agency self-assessment model. In addition, I will be continuing to undertake significant and systemic investigations of issues arising in the Ombudsmen Act area.

One recent example I can refer you to is the report by former Ombudsman Professor Ron Paterson on the conduct of the former State Services Commissioner's enquiry into MFAT leaks. While this was not related to a request for access to information, it is a prime example of the way an Ombudsman can contribute to the promotion of a high level of integrity in the actions of those in power, and thus maintain public trust in government. You can rest assured that we will be fearless in the pursuit of fair and proper administrative practice.

I should also mention here the important work being done by my teams who focus on protected disclosures, disabilities and the treatment of people who are in detention. You may well have seen an increasing focus in the news media on detention issues recently. Take for example the work by my staff to address the case of Ashley Peacock, who has been in compulsory treatment since 2006 and in seclusion for over 5 years, a situation which I consider untenable. These teams have an important role to play in the tapestry of key democratic and human rights measures which the Ombudsman carries out, in order to safeguard the rights of individuals and increase government transparency and accountability.

Finally, I know you will all be waiting to hear from me as to what I intend to do in the area of '*league tables*'. I have made it clear that I intend to start publishing official information statistics as a means to drive improvements in agency performance and compliance with the official information legislation. My staff are still working out the finer details of the approach, but what I can tell you at this stage is that:

- publication of our complaint statistics will be part of a wider strategy aimed at increasing state sector transparency and standardisation of data around how the official information legislation is operating; and
- publication will relate to complaints closed from 1 July 2016 onwards, and there will necessarily be a lead in time of analysis and preparation before the first set of data can be published, possibly on a quarterly basis.

I will be able to engage with you further on this soon, as I want the publication of statistics to be done on a *'no-surprises'* basis, in context, and in a way which encourages the further development of good practices in the official information area.

To conclude, I am very positive about the future of the Ombudsman's office, and I will be working very hard to live up to our motto of *'Fairness for all'*.

[Ends]