Ombudsman
Fairness for all

The Ombudsman and the Official Information Act: A Free and Frank Appraisal

Chief Ombudsman's address to Lawyers in Government Conference

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Today I am going to give you a read out on my first seven months in office. It has been an exciting time settling into this very important constitutional role. I have used this time both to become familiar with the various crucial watchdog functions of the Ombudsmen, and also to sow the seeds for some internal and external changes that I believe will enhance the effectiveness of the Office and the overall accountability of the public sector.

I will first touch on the purposes and principles of the Official Information Act, and its constitutional role in our New Zealand democracy. I will then 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 agencies, and the work that is being done by my own Office. Following that I will discuss my approach to some withholding provisions under the OIA, then will finish by giving you an indication of my future direction for the Ombudsman, and what this means for agencies.

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.*

As government lawyers, you will be aware of the purposes of the Official Information Act, and the importance of those purposes both at a broad constitutional level, and at an operational level in applying 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.

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

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'*.

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 for being here today, and encourage you as lawyers in the engine room of government to do your part in ensuring that your agencies' legal obligations under the OIA are met, 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, the report identified the need 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.

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.

When should Official Information not be released

I want to make some carefully chosen remarks to you as to circumstances when the Ombudsman might not recommend release of Official Information. I do this for two reasons. Firstly, in his excellent paper delivered this morning, Andrew Kibblewhite has centred a discussion on free and frank advice and referred to the Official Information Act in that context. It seems helpful for me to give a further perspective. And the second reason is this, earlier this year, I delivered an opinion in a case in which I found that the public interest superseded legal professional privilege. That has created some interest. I shall deal with that.

The scheme of the Official Information Act flows beautifully. Section 5 sets out the general principle of availability and section 6 contains conclusive reasons for the withholding of official information. One of the grounds pertains to the confidentiality in respect of which information was given to our Government by another.

Section 9 is the provision which most concerns us today. That section sets out good reasons for withholding official information unless those reasons are outweighed by other considerations, in the public interest.

A very careful reading of each situation to which section 9 may apply is required. I stress this. The approach is a case by case, fact by fact requirement.

Having said that, I think it more helpful than not that my Office outlines its thinking from time to time, on the correct approach it believes should be taken in certain situations. To provide some guidance seems to me to be helpful, while having to acknowledge that unlike section 6, there can be no conclusive statement of approach to section 9, because, it will depend on the individual circumstances and the weight of the public interest.

There are three aspects to section 9 that I want to focus on and they are:

- 9(2)(f)(iv) – the confidentiality of advice tendered by Ministers of the Crown and officials;
- 9(2)(g)(i) – the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or offices and employees of any department or organisation in the course of their duty;
- 9(2)(h) – maintain legal professional privilege.

Confidentiality of advice tendered to Ministers

It seems to me that this is a quite different situation to the "free and frank expression of opinions" which follows straight on. The focus of section 9(2)(f)(iv) is the maintenance of the constitutional convention which protects the confidentiality of advice tendered by ministers of the Crown and officials. The convention recognises that there are situations in which Ministers should be free to deliberate on advice from officials in an effective and orderly manner, where there is an expectation of confidentiality around the advice, and where release of advice would impact adversely on the decision making process. It will not be helpful if this important constitutional arrangement is eroded by premature disclosure of policy advice, unless of course there are matters in the public interest that compel a level of transparency with respect to the particular decision making process.

Generally, where the section applies, only advice is protected, rather than the options being considered. Moreover the section 9(2)(f)(iv) interest is time bound; usually there is no basis to withhold the actual advice once decisions have been taken. Additionally, depending on the nature of the policy process in question, there may well be a public interest in release of a summary of any advice that is *prima facie* protected.

When tendering advice, I would encourage agencies to be strategic by ensuring a sufficient level of transparency around their decision making to enable the public to participate, as well as planning for eventual release of material once decisions have been taken, preferably proactively.

Free and frank expression of opinion

The next provision is I feel, more interesting and quite different. The provision is relevant where an agency is concerned that releasing information will impact on the effective conduct of public affairs by inhibiting the generation and expression of opinions in a free and frank manner in the future.

I have asked myself what the words "free and frank" really mean and I think they connote a level of candour quite different to the flavour of advice which I have just referred to. Again, I do not think it will be helpful from a constitutional point of view if the ability for this to occur is eroded by disclosure where disclosure will interfere with good governance.

It is not the free and frank exchanges of opinion *per se* that are protected under the section, but effective government. The case of a request for transcipts of the Police response in

relation to Iraena Asher's 111 calls is illustrative of this distinction. Free and frank opinions on the part of a Police employee were expressed in the call, but as those opinions were highly inappropriate, generation of similar opinions in the future would not enhance "the effective conduct of public affairs", and the section did not apply.

The 2014 LINZ Overseas Investment Office case of Ombudsman Paterson demonstrates how the section operates more generally. Matters relevant for consideration are the nature and content of the information, the context, the author, and the relationship between the author and intended audience. The information at issue in that case, although in the nature of opinion, was fully reasoned and expressed in measured and moderate terms. It was a final report to the Minister, authored by the Manager, and conveyed the opinions of the regulator and not herself. For these reasons the Ombudsman was in my view rightly "highly sceptical" of the claim that release of the information would be likely to inhibit free and frank opinion, which he saw as being tantamount to the suggestion that the regulator would not do his job.

On the question of public servants doing their job, Andrew Kibblewhite referred to the stewardship requirements on CEOs under the State Sector Act amendments, to ensure the "capacity to offer free and frank advice". However of perhaps greater significance in the OIA context, is that section 32 provides as another of the "principal responsibilities" of CEOs and their delegates the *actual* "tendering of free and frank advice to Ministers". That the tendering of such advice is a core statutory function of a CEO needs to be borne in mind when interpreting s9(2)(g)(i), and assessing the likelihood of officials being constrained in providing free and frank opinions. I see the 2013 amendments as heralding an era in which claims for s9(2)(g)(i) protection will be carefully scrutinised, bearing in mind section 4 purpose of progressive release of official information.

Andrew Kibblewhite also touched on the trend he has seen of less being written down than it used to be, and has encouraged you all to complement free and frank conversations with written advice when Ministers are taking significant decisions. I agree, but would in fact go further by encouraging you to record *all* substantive advice. Where officials do not record advice, they run the risk of breaching an agency's obligations under the Public Records Act to create and maintain records in accordance with normal prudent business practice. They also risk poor decision making, running foul of audit requirements, as well as legal challenge, if the basis of a decision cannot be determined. Any belief that not recording advice avoids OIA obligations is misguided - the OIA applies to all information held by agencies, including that in the heads of officials, and I have the power subpoena officials to obtain that information where necessary. So, in sum, an agency that is not recording substantial information through fear of eventual disclosure under the OIA will inevitably, at some stage, have bigger problems to face than discovery of the information!

Similarly, it would not be appropriate to seek to avoid the application of the OIA by, for example, giving documents bland titles. To do so would be at odds with the purposes behind the OIA as well as being strategically unwise - the most likely result would more fulsome requests from requesters unable to work out the content of the documents.

Legal professional privilege and public interest

Finally, is the position in relation to maintaining legal professional privilege. Whether legal professional privilege applies to any information will depend on a number of factors including the nature of the advice given, who has given it, and its purpose. The privilege cannot simply be claimed to apply because a lawyer generated the information. You will be aware that solicitor/client privilege attaches to communications between a government legal adviser and their agency or Minister as client where the purpose of the communications is to seek or impart professional legal advice. Similarly, litigation privilege will attach to official information, where it has been generated for the purposes of enabling a legal adviser to conduct or advise on the conduct of current or reasonably anticipated proceedings.

We come then to the point that if the various types of official information to which I have referred does not need to be disclosed because of the harm that would be caused by its disclosure, a second inquiry must occur, and that is that the withholding of it might be outweighed by other considerations. The Act refers to the broad aspect of public interest. While public interest is not defined, the section 4 purposes of enabling the effective participation in the making and administration of laws and policies, and promoting the accountability of Ministers and officials are of guidance.

Where there are public interest considerations favouring release of material protected by a section 9(2), that does not always necessitate full disclosure of the information. It may be that the provision of a summary might sufficiently meet the public interest but yet preserve the withholding of the information itself.

Some cases lend themselves to a close application of section 9 factors. I talk here in particular, of my Police portfolio where the withholding of information may be required on the number of grounds. But I have wanted to focus my own remarks today on just the specific aspects to which I have referred, because I want to give the guidance and reassurance that my Office will rigorously apply the principles that the Act requires, and have regard to many similar decisions which have been made on these aspects, in the past.

You should be reassured too, as to the process that we undertake in forming a final view on some of these things. If for instance, I come to the provisional view that say, information should be released, I indicate that in a provisional opinion and the agency is then asked to respond. I reach a final view having regard to what everyone has said. It is a careful, measured process.

I paid particular attention to the process when I gave my opinion on legal professional privilege in a Ministry of Health case earlier this year. I formed the opinion that the need to maintain privilege was outweighed by the public interest. A close reading of what I said will indicate that I have done nothing to erode the careful measured analysis that we undertake and the conclusions that we come to, on a case by case basis. The legal advice at issue in that case, at Crown Law's admission, was "unexceptional" being advice to a regulatory agency on the interpretation of a statutory term. The advice was in effect a statement of law, akin to a judgment of the Court, rather than what might be seen as contentious legal advice on particular facts in a sensitive context, such as where litigation is imminent. I found that the

public interest in enabling a senior health researcher to understand a crucial term in the legislation under which she was working outweighed the need to maintain the privilege, noting that I could think of no reason why the Ministry would seek to withhold it in the context in which it was sought.

I am aware that that opinion has generated some attention. When considering that case, I think it is important to recall that Parliament saw fit to include legal professional privilege under section 9 rather than section 6, i.e. as an interest that is not absolute but is to be weighed against other public interest considerations. In that context, while I need no convincing to as to the strength of the public interest in maintaining legal professional privilege, I see no basis to regard it as a sacred cow incapable of being outweighed in the OIA context.

I agree there's an opportunity to provide guidance to officials on the difficult parts of the Act. As touched on earlier we have an ambitious programme of guidance under development. Recent publications are on the public interest test and charging for official information. In the wings is a guide on OIA requests involving ministerial interests - including transfer, consultation and notification of OIA requests. Next after that will be guides on the administrative refusal grounds, including substantial collation and research, and frivolous or vexatious, because agencies tell us they're struggling to deal with requests that are administratively challenging to fulfil.

My vision for the future and how I will get there

So at a practical level, what am I doing to enhance operations for now and in the future to ensure my goals are met? I recently released 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 a responsible, accessible and robust watchdog over the actions and decisions of those exercising executive power and organisation of excellence.

I have received specific funding from Parliament for the next 3 years for an additional team to target the aged complaints that are already over a year old. 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 actually advise you that we are already part of the way there. My staff have worked very hard over the last 7 months to start turning the ship around, and 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 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 engage flexibly with agencies 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 your agency 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. 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 am also 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.

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 agencies are 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 agencies 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'*.