Volume 5, Issue 1. March 1999
ISSN 1173-5376

Editorial

When is official information actually *"held"?*

Advances in computer technology over the last decade have changed dramatically the way in which public sector agencies generate, process and store information. There are also ramifications for their responsibilities under the Official Information legislation.

When the Official Information Act first came into force in 1983 (and LGOIMA four years later), most public sector information was held on files in paper form. Specific information could be accessed on request generally without difficulty. Therefore, the first question for public sector agencies on receipt of a request under the legislation for specific information – namely, "*is the information requested held?*" – could usually be answered without difficulty. The information was either *"held"* or it was not *"held"*.

In today's world, there are two differences. More information is held in raw data form and improved information technology has greatly enhanced the ability to generate new information quickly from that data. Whether information is actually *"held"* or whether it needs to be *"created"* to meet a request are matters we are now being called on to determine more frequently.

It is one thing for information that can be retrieved simply from a database. It becomes something else when an organisation must undertake research of source data to generate fresh information in a form different from that in which the base data may be held.

The Official Information legislation (OIA and LGOIMA) is clear. It applies only to information *"held"* by public sector agencies subject to it. If the specific information requested is not held then the Official Information legislation does not apply.

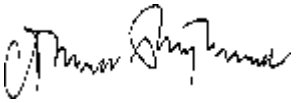
The fact that the agency concerned may have the capacity to create the information requested is not relevant. The right to request access to specific information does not extend to a right to require agencies to conduct research or otherwise generate new information on matters of interest to the requester so that the request can be met.

There is little doubt that as public sector agencies make greater use of options for the generation, processing and storage of computerised information that the issue of whether certain information that has been requested is *"held"* or not for the purposes of the Official Information legislation may become difficult to determine. In cases where it is accepted that certain information, as requested, is not *"held"*, wider issues will inevitably arise – such as:

- Who should bear the cost of generating new information not already *"held"?*
- Whether there is an obligation on public sector agencies to hold certain information in certain circumstances.

These wider questions are likely to become increasingly important. We will address them in more detail in future editions of the Quarterly Review, *Te Arotake.*

Sir Brian Elwood
Chief Ombudsman



Anand Satyanand
Ombudsman

Information Privacy and Mental Illness

Concerned families of people suffering from mental illness sometimes find it difficult to accept the restraints placed on official information in order to protect privacy. Of course, information about another individual may be released, if they give permission, but sometimes this may be impossible to obtain.

A recent case illustrates this in a poignant way. A complainant sought Ombudsman help in locating her daughter (aged 48) who suffers from schizophrenia and had also become reclusive, avoiding contact with her mother and adult children for some months. They were worried about her.

The complainant believed her daughter was receiving the sickness benefit. She contacted Work and Income New Zealand (WINZ), which offered to pass on a letter from the complainant to her daughter, but declined to release the daughter's address, on the grounds that this would infringe her privacy.

The complainant was disappointed with this outcome. She queried the need to maintain privacy in circumstances where the subject of the request may be mentally ill, and not able to make rational decisions about their own welfare.

Following an approach to her Member of Parliament, the complainant asked the Ombudsman to review WINZ's response under the Official Information Act.

Clearly, there would be privacy grounds for WINZ to withhold any address it might hold for the complainant's daughter. It seemed that the only way the Ombudsman might be able to assist the complainant would be to seek the daughter's permission for her address to be disclosed to her mother.

However, when WINZ was asked to provide the Ombudsman with the daughter's address, it advised that it had not heard from her for four months, and had not succeeded in contacting her at the address she had previously provided.

The Ombudsman wrote to the daughter at the last address held by WINZ but it was returned unopened, marked – "no longer at this address." The Ombudsman had to advise the complainant that he was not able to take matters any further.

However, because the complainant's daughter was no longer receiving a sickness benefit and no longer had a known address, it was open to the family to pursue other avenues of inquiry – such as through the Police for a missing person – rather than through the Ombudsman.

ADMINISTRATION, NOT POLICY

Ombudsmen are restricted to dealing with complaints about administrative actions; policy-making is for the Government.

A complaint was made that New Zealand's reciprocal agreement with the United Kingdom with respect to superannuation payments was less favourable than that with the Netherlands which allows portability of the full New Zealand superannuation.

The complainant had worked in New Zealand for 32 years, paid the full single-person tax rate, and not claimed the full National Superannuation until the age of 68. At 69, she had returned to the UK to be with family, and was aggrieved that the income she received from her UK pension was below what she regarded as the British poverty line.

Under the terms of the agreement,periods of residence and/or employment in New Zealand are equated to Class 3 contributions to the United Kingdom scheme. Conversely, contributions to the United Kingdom scheme are regarded as residence in New Zealand for the purpose of meeting the New Zealand requirements. The complainant was therefore entitled to a United Kingdom pension, not to payment of New Zealand National Superannuation.

She was entitled to seek a review by the British authorities of her entitlement. But the Department of Social Welfare in New Zealand was acting in accordance with the Agreement entered into by the Government, and so had no discretion in the matter.

The difference between New Zealand's arrangements with the United Kingdom and the Netherlands was historical; the British one dating from just after the Second World War and the Dutch one from 1990. Before the British Agreement could be changed to match the Dutch one, it would have to be renegotiated with the British Government. It was not a matter over which the Ombudsmen had any jurisdiction.

Tinkling the Endangered Ivories

A stalemate had developed in attempts to uplift a piano from the Customs Department. The complainants were trying to have a piano which had been in their family since the 1920s shipped from Britain to New Zealand.

When the piano arrived in New Zealand, Customs advised the family that it could not be released without the approval of the Department of Conservation, under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). It was suspected that the piano keys contained ivory.

The Department of Conservation advised the complainants that they needed to obtain a formal exemption from CITES – to which both New Zealand and Britain are signatories – from Britain. However, on contacting Britain, the complainants were told that it was not possible to issue such a certificate retrospectively.

To complicate matters they were also told that under European Community Regulations, they were entitled to take the piano to New Zealand as personal or household effects.

The Department of Conservation advised that there was a conflict between the requirements of the New Zealand legislation implementing CITES and the EC Regulations.

As the piano had been in the family since the 1920s, it would qualify as a "pre-Convention specimen" and be exempt from the usual CITES trade documentation requirements. However, a certificate to that effect from Britain was required both under CITES and the New Zealand legislation.

To resolve the matter, the Department accepted a statutory declaration from the complainants confirming the age and status of the piano. While this did not actually comply with CITES requirements, it allowed the Department to issue a CITES Certificate of Acquisition, and thus ensure compliance with the New Zealand legislation. Written confirmation was then sent to the Customs Department approving the release of the piano.

The Department also advised that it intended to approach the CITES Secretariat to seek a possible resolution of the conflict between the obligations under CITES and the way in which these obligations are implemented in the New Zealand and European Union legislation.

BREAKDOWN OF DEBT SHOULD BE SUPPLIED

A complainant assessed by the Department of Social Welfare as owing it money should have been supplied with a breakdown of the debt.

A part-time taxi proprietor had applied for income support to supplement the low income from his business. To receive the supplement, he was required to provide regular declarations of his income from his business so that the level of support payable to him could be kept under review.

These reviews found that he had been receiving support above his entitlement and a debt was established against him by the Department's Income Support Service. Once the debt had been assessed, he sought a review of this by the Department. It was reduced, and a subsequent application for review led to a further reduction.

But when the debtor sought a breakdown of the figures this was not forthcoming, and he approached the Ombudsman. He did not dispute that there was a debt, but objected to the assessment and the way it had been reached. He told the Ombudsman he had made a series of requests for a breakdown, but that these had not been provided.

The Department told the Ombudsman a breakdown of the debt had been provided, but was unable to find any evidence of this, and so decided to write-off the balance of the debt still owing. As the complainant had not disputed that there was a debt, the Department considered it fair to retain the amount that had already been recovered. The complainant was happy with this outcome.

Cost of a Fishing Expedition

A charge may be made under s15 of the Official Information Act for the provision of official information in response to a request, providing that any charge fixed is reasonable. S15(3) provides that the whole or any part of a change may be required in advance.

A request was made to the Ministry of Fisheries for information relevant to a decision not to issue a fishing permit. The Ministry estimated the charge for providing the information at $500-$1,000.

In an effort to reduce the charge, the requester refined the request, which the Ministry then processed. Once the work had been completed, the Ministry informed the requester that the charge for meeting the request came to $732.20. The requester complained to the Ombudsmen.

The Ombudsman function under the OIA, as it relates to complaints about charging for official information, is to investigate and review whether in all the circumstances of the case the charge levied is reasonable.

Although the requester argued that the Ministry had undertaken a search for documents beyond those requested, it is not an Ombudsman's function to determine what information held by a Department is relevant to a particular request.

In this case, the review confirmed that the Ministry had calculated the charge in accordance with the Cabinet Guidelines on Charging and, after confirmation of the staff time and copying involved, it was determined that the charge was reasonable in the circumstances of the case.

The requester made a second request to the Ministry for one specific document, and complained to the Ombudsman about the Ministry's refusal to provide that document until the outstanding charge of $732.20 had been paid. It was established that the document requested was covered by the terms of the earlier request and that the Ministry was entitled to require payment of the full charge before any relevant information was released.

Theft in Jail

A prison inmate lodged a property claim with the management of his prison after he had had a quantity of his property taken while being assaulted by other inmates.

The prison authorities rejected his property claim, on the basis that inmates are responsible for their property once it has been issued to them.

However, when the matter was raised with the Ombudsmen, it was established that this particular inmate had requested protective segregation, and should not have been in a mainstream unit when the assault occurred.

There was a subsequent review of the decision by the prison management, and the inmate's claim was allowed.