Volume 5, Issue 2. June 1999
ISSN 1173-5376

Editorial

THE OMBUDSMEN'S ROLE IN INVESTIGATING AND REVIEWING DECISIONS TO WITHHOLD OFFICIAL INFORMATION

The statutory role of an Ombudsman, in investigating and reviewing under the Official Information Act a decision by a Department or Minister of the Crown or organisation to withhold certain information, is to form his or her independent opinion, after considering the information at issue and the concerns expressed about the predicted harmful effect of disclosure, as to whether the request should have been refused.

In *Commissioner of Police v Ombudsman* [1988] 1 NZLR 384 at p 411 (lines 10-20), Casey J addressed this issue as follows:

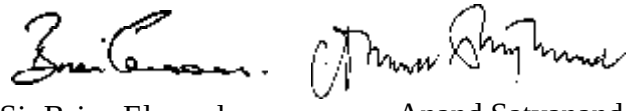
> *"The next matter is the so-called 'burden of proof'. I agree with Jeffries J that in conducting a review of the decision, the Ombudsmen are not engaged in an adversarial exercise. The provisions of the Ombudsmen Act apply (s.29 of the Official Information Act), and under ss.18 and 19 they are given wide powers of inquiry and are not confined to the material put before them by those immediately involved. In the nature of things he who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition. But the review is to be conducted and the decision and recommendations made without any presumptions other than those specified in the Act."*

When assessing whether certain information needs to be withheld, it is reasonable for an Ombudsman to require the holder of the information to bring forward adequate supporting material for its proposition that good reason for withholding exists. In a recent case, an organisation failed to establish that there was adequate supporting material to make out good reason for withholding under the Act. The investigation concluded with a recommendation for release of the information.

Under section 32 of the Official Information Act, a public duty to observe an Ombudsman's recommendation under the Act is imposed from the commencement of the 21st working day after the day on which the recommendation is made unless, before that day, the Governor-General by Order in Council otherwise directs.

During the 21 days following the recommendation, the organisation decided that it wished to present specific arguments, not presented earlier, on a small part of the information recommended for release. These further arguments were not raised until after the statutory period had expired and after the public duty had vested. At that stage, the Ombudsman had no power to rescind his recommendation.

Arguments in support of withholding information should be formulated and put before the review process has reached a point where the public duty to comply with an Ombudsman's recommendation has arisen.



Sir Brian Elwood
Chief Ombudsman

Anand Satyanand
Ombudsman

Public Interest or Of Interest to the Public

Even when certain grounds, that may provide good reason to withhold official information, apply to requested information, those grounds may be outweighed by other considerations that render it desirable "*in the public interest*" to make the information available.

There is a distinction to be made between what is properly "*in the public interest*," in the sense of being of legitimate concern to the public, and matters which are merely interesting to the public on a human level, when considering requests for official information.

The distinction is between what is interesting to the public and what is in the public interest to be made known.

The Minister of Justice decided to withhold parts of a report not published during an associated High Court trial, pursuant to s9(2)(ba)(i) of the Official Information Act. His decision led to a complaint to the Chief Ombudsman, who investigated the complaint and was satisfied that the Minister had good reason for his decision under that section.

However, s9(1) of the OIA requires consideration of whether reasons for withholding information might not be outweighed by other considerations which render it desirable, "*in the public interest,*" to make the information available.

The Chief Ombudsman considered that it was obvious that the information might be "*interesting*" to the public on a human level, but that in terms of the proper test to be applied, the "*public interest*" did not outweigh the reason for withholding it.

He said the substance of the report, details of which had been sought by the complainant, had been discussed in a public trial. Thus the legitimate public interest in the report had been met by the publication of the substance of that report in the full and detailed Court judgment.

INFORMATION NOT "HELD" NOT SUBJECT TO OIA - *A PRACTICAL APPLICATION*

Official information is defined as information "*held*" by an organisation subject to the Official Information Act.

Where a request for information might be able to be satisfied by research and compilation – in other words, "*created*" as distinct from being "*held*" - it is not subject to the Act.

A request in the form of a series of questions was made to the Police for certain statistical information on the suspension and retirement of police officers.

Initially, the Police indicated that they were willing to provide the information sought, but at a substantial cost because of the amount of work it was estimated would be required to extract the raw data needed to construct accurate answers to the questions put. The requester baulked at the estimated charge, and complained to the Ombudsmen.

It emerged that some of the information sought was not "*held*" by the Police. If the information is not held, and there are no grounds for believing that the information is held by any other organisation subject to the Act, then the request can be refused in terms of s18(g) of the Official Information Act.

Although the Police were willing to compile the information at a cost to the requester by gathering the necessary data, the information was not "*held*".

The appropriate response from the Police in terms of the Official Information Act was not to charge for it but to decline the request – relying upon s18(g) of the OIA. In these circumstances, the decision to charge for compiling the information and the amount of the charge was not a matter for review by the Ombudsman under the OIA.

USE OF THE TERM *"OMBUDSMAN"*

Earlier this year a major local authority – the Christchurch City Council - appointed an officer designated as *"Corporate Ombudsman."*

While the Council's apparent objective of providing an in-house complaints service was laudable, the use of the term *"Ombudsman"* is unlawful unless it is with the prior written consent of the Chief Ombudsman, appointed under the Ombudsmen Act, 1975. S28A of that Act provides for the protection of the name *"Ombudsman"*, in the following manner:

(1) No person other than an Ombudsman appointed under this Act may use the name "Ombudsman" in connection with any business, trade, or occupation or the provision of any service, whether for payment or otherwise, or hold himself, herself, or itself, out to be an Ombudsman except pursuant to an Act or with the prior written consent of the Chief Ombudsman.

(2) Every person commits and offence and is liable on summary conviction to a fine not exceeding $1,000 who contravenes subsection (1) of this section."

The policy applied by the Chief Ombudsman over the years is that consent to the use of the name will not be given in cases where such an "Ombudsman" is not fully independent of the organisation that may become subject to an investigation by the person so designated.

That is not the only relevant factor to be considered where consent is sought, but is one that would preclude the Chief Ombudsman giving favourable consideration to any request a local authority might make for consent to be given to the use of the name "Corporate Ombudsman" by one of its staff.

When the problem was brought to the attention of the Council, it accepted that its good intentions were in error, and undertook to look at options for another name that reflected the role but also did not breach the provisions of the Ombudsmen Act.

NON-CUSTODIAL PARENT and SCHOOL PRIZE LIST

A non-custodial parent could not attend his child's school prize-giving and was denied access to the prize list when he sought it.

The information was withheld because the student was adamant it should be, alleging the requester had previously misused information about his children. It was claimed this misuse had amounted to harassment and breach of privacy.

The school had already announced the list publicly at the prize-giving ceremony and planned to publish it in the school magazine, which would be available at the public library. Thus s9(2)(a) of the Official Information Act provided no grounds for withholding because it was not **"***necessary***"** to do so to protect the student's interests.

Still less did s6(d) provide grounds for withholding. The phrase *"endanger the safety"* of any person has generally been accepted by successive Ombudsmen to mean there must be a substantial risk that a person's life is likely to be put in peril, or there is a danger to their physical safety, should the information at issue be released.

The Ombudsman ruled that neither section provided a valid reason to withhold. Being a non-custodial parent should not involve being denied access to the school's prize-giving list.

Deed of Confidentiality

A councillor complained to the Ombudsmen when a Deed of Confidentiality was distributed to councillors of the Hutt City Council for their signature.

Signatories to the Deed were required to keep confidential what was described as – *"project information and other commercially sensitive information"* - and to indemnify the Council for any losses incurred by the Council as a result of that individual's breach of the Deed – limited to $100,000 for each breach. Unless the Deed was signed, the implication was that the councillors not signing would not get access to such information.

Councillors are entitled by virtue of the office to have access to all information for which there is good reason for such access. This principle is known as the *"need to know test."* Councillors should have access to the information which is necessary to enable a proper discharge of their duties.

If information was denied to any councillor, they could make a request for it under LGOIMA, and the refusal to grant access would be assessed in accord with the provisions of that Act.

Thus local authorities may not withhold official information from councillors when requested solely on the basis that a councillor has not signed such a document as a Deed of Confidentiality.

Attorney-General Not a Minister of the Crown

Section 7 of the New Zealand Bill of Rights Act, 1970, provides that the Attorney-General shall report to Parliament where any Bill appears to be inconsistent with the Bill of Rights Act. Legal advice provided to the Attorney-General by the Ministry of Justice on a particular Bill was sought by a requester.

"Official information" is defined in s2(1) of the Official Information Act as meaning, among other things, *"information held by a Department, Minister of the Crown in his official capacity, or organisation"*.

The Attorney-General is not listed in the relevant schedules to either the OIA or the Ombudsman Act which define the departments and organisations subject to the OIA. Nor is the Attorney-General a Minister of the Crown by virtue of holding office as Attorney-General and so cannot be brought within the scope of the OIA in that capacity.

Where information is held by the Attorney-General, in that capacity, it is not *"official information"* and the OIA cannot be used to gain access to it. That view is based on the constitutional position of the Attorney-General.

In this particular case, the Attorney-General was also the Minister of Justice. But the information was held by him as Attorney-General and in that capacity. It could not be deemed to be held also by the Minister of Justice. The request was therefore outside the scope of the OIA.

Internal Police documents

Information contained in internal Police documents may be withheld if protected by the confidentiality section (61A) of the Police Act.

A political party researcher asked the Police for documents relating to their handling of two student demonstrations. This was refused, relying on s61A of the Act which confers confidentiality on the Police Gazette and every other police notice or circular, or other similar documents.

The Ombudsman agreed that the documents sought were covered by s61A, because they had been published by a member of the Police and were intended for circulation only to members of the Police. Disclosure of certain information in those documents was accepted as being likely to prejudice the maintenance of the law, including the prevention, detection and investigation of offences.

As such, they were covered by s18(c)(i) of the Official Information Act, which provides a ground for refusing information on the basis that – *"…the making available of the information requested would be contrary to the provisions of a specified enactment."*

However, an Ombudsman may investigate to determine whether that section is properly invoked in individual cases.

IMMIGRATION HICCUPS FIXED

In two recent cases, recourse to the Ombudsmen provided the New Zealand Immigration Service (NZIS) with the chance to resolve complaints about its performance.

In each case, the complainants had lodged residence applications and, while these were being processed, had applied for further temporary permits. But the NZIS had refused to grant further temporary permits and advised that the residence applications would be forwarded to the particular overseas branch which dealt with applications from the complainants' home country.

Once the Ombudsman had started to investigate the two cases, the NZIS itself reviewed the matter and agreed that the applications for temporary permits had not been considered properly according to the Government policy and current practice. It was also agreed that in the circumstances the residence applications should not have been transferred overseas.

To resolve the complaints, the NZIS offered to apologise for the way in which each case had been handled, to grant visitors' permits to the complainants, and to continue processing the residence applications.