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Editorial

Duties on Holders of Official Information

Holders of official information, when responding to requests for information, should ensure requesters have specified what they actually want.

If the request is for specific information, then there is no difficulty in responding and deciding whether it is to be released or if a withholding ground is to be invoked. Sometimes, though, it is not so easy to identify what the requester is seeking to obtain. The Official Information Act provides mechanisms to assist the process.

Section 12 of the Act provides that a request for official information must be specified *"with due particularity in the request."* In other words, the person receiving the request must be able to identify the information requested. But if a requester has not specified the information sought with *"due particularity"* - where the request is cast in vague or uncertain terms so that it is not possible to determine exactly what is being requested - that does not provide the holder with good reason to refuse it.

This is so because s.13 of the Act imposes a duty on organisations to – *"give reasonable assistance to a person … to make a request in a manner that is in accordance with [s12] or to direct his request to the appropriate Department or Minister of the Crown or organisation or local authority."*

"Reasonable assistance" means something more than simply telling the requester that the request is not sufficiently specific. The aim should be to assist the requester to identify *"with due particularity"* (in terms of s12) the information sought.

The principle of availability – *"that information shall be made available unless there is good reason for withholding it"* – which underpins the official information legislation means that a requester does not have to provide reasons for seeking particular information. However, providing some information about why a request is being made can often assist the recipient to understand what is being requested, to identify the exact information sought and determine whether the information requested is held by the agency receiving the request.

Consultation with the requester to provide reasonable assistance in terms of s.13 may well result in a request being refined so that the work involved in identifying and providing the information is reduced.

At the same time, the requester is reassured that the request is receiving careful attention.

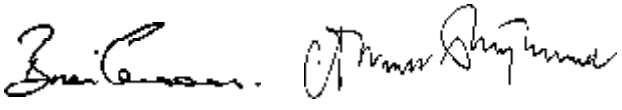
The Law Commission Review of the Official Information Act (Report 40) endorsed this approach and, indeed, recommends that s.13 be amended to *"encourage dialogue between an agency holding information and the requester."* It goes on to suggest (para E12) that *"the Act should expressly allow a requester to specify, and an agency to have regard to, the purpose for which the information is sought; but also prevent an agency from relying on a failure to specify a purpose as a ground for refusing the request."*

A recent investigation arose as follows. A requester considered certain information should have been held by an organisation, and requested it. The information was not *"held."* However, instead of declining the request and advising that it did not exist in terms of s.18(g) of the Act, the reply simply ignored that part of the request.

Some of the information relevant to the request was provided in summary form, but the requester was not informed of this. The omission led the requester to assume that relevant information was available but that not all of it had been provided.

Consultation at an early stage might have established more precisely the information required. An explanation to the requester of the information actually held and that only a summary of that information had been provided would have satisfied the requester without the need for an Ombudsmen's investigation and review.

There is no sanction provided by the Official Information Act for failure to provide *"reasonable assistance"* in terms of s.13. However, if it becomes clear that particular agencies are repeatedly ignoring the intent of that section, then an Ombudsmen Act investigation into the administrative processes of the agency concerned could result.



Sir Brian Elwood
Chief Ombudsman

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Review and Appeal Rights Available over Decisions on Benefits

There are frequent complaints about benefit matters.

The Ombudsmen can investigate complaints which are directed, for example, at the manner in which departmental staff have administered the benefit, failed to respond to correspondence or to act on relevant information. But beneficiaries themselves have direct statutory review and appeal rights in respect of decisions on whether to grant, vary or cancel a benefit.

S.10A of the Social Security Act 1964 provides a right of review to a Benefit Review Committee. This Committee comprises a community representative and two departmental officers, neither of whom must have had anything to do with the decision under review.

If a beneficiary is dissatisfied with the decision of the Committee, s.12J of the Act provides a right of appeal to the Social Security Appeal Authority, a tribunal whose members are appointed by the Governor-General.

The significance of this is that the effect of s.13(7)(a) of the Ombudsmen Act 1975, states that where a person has the right to challenge a decision by way or review and appeal on the merits of a case, Ombudsmen are precluded from investigating the decision unless by reason of special circumstances it would be unreasonable to expect a complainant to resort to those rights of review and appeal.

In a recent case, the complainant had been receiving an Invalids Benefit since 1979 due to blindness. His wife had been included in the benefit from the date it had been granted until the date of their separation in 1997.

In early November 1997, the wife, who had completed most of the paperwork associated with the benefit since the date it had been granted, applied for assistance to pay a power account as the supply was about to be cut off. Payment was approved and the amount released to the power company.

A letter was sent to the beneficiary confirming details of the grant and how it would be recovered from him.

The complainant said he had neither been advised of nor consented to the amount of the power account being advanced against his benefit. He believed the money had been advanced without authority and should not have been recovered from his benefit. He acknowledged that his wife had provided him with assistance completing forms which required his signature, but at no stage was she given authority to act on his behalf.

In its report, the Department advised that although it was not usual practice to accept another person's signature on an application for assistance, there had been a long history of the complainant allowing his wife to sign application forms. On this basis, the Department had no reason to believe the complainant objected to his wife attending to his benefit matters.

In addition, the Department said that in the case of a married couple, Income Support had the ability to recover advance payments of benefit from either party. Although the benefit was apportioned between husband and wife, there was only one benefit.

The Department explained that it had approached the power company to see what the outcome would be if it recovered the money paid to meet the power account. The company had been prepared to repay the money to Income Support, but would then look to the complainant for payment of the account.

The Department felt it had acted in good faith in advancing the monies for the power account and also considered recovery from the complainant's benefit was in order. It also pointed out that complainant could have sought review by the Benefit Review Committee of the decision to recover the advance.

Given that a formal right of review to the Benefit Review Committee and then (if necessary) to the Social Security Appeal Authority existed, the Ombudsman was precluded from investigating the matter.

Different Land Tenures May Lead to Difficulty

When a property is held under different types of tenure, difficulties may arise, as a complainant to our Office learned as follows.

A farm property comprised adjacent partly private freehold and partly a lease of Maori land, both farmed together. The owner wished to sell both parcels. Under the Maori Reserved Land Amendment Act, the Maori Trustee as representative of the owners had the right by deed to take over the lease when the lessee wished to dispose of it. The farmer's concern was that if the Maori Trustee exercised this option, the freehold land left standing alone would be of much reduced value, which would happen if the Maori Trustee did not wish to purchase the freehold land.

But although the Act itself nowhere deals with the issue of land held under more than one system of tenure, it was discovered during the investigation that this had been considered by the Parliamentary Justice and Law Reform Select Committee dealing with the legislation.

It received and considered a submission from someone in a situation similar to that of the complainant. It responded:-

"We spent much time in consideration of this matter. There is nothing to prevent a lessee … from also offering the lessors the first opportunity to purchase the freehold title at the time the lessee places the leasehold on the market. The obligation to purchase the freehold title could be made a condition of the sale of the leasehold. The lessors would have a right to purchase the titles at the price stipulated by the vendors, or to refuse to do so. In the latter case, the sale can proceed, although no sale can be made on terms which are more favourable to the purchaser than those which were originally offered to the lessors."

Because the circumstances considered by the Select Committee were so similar, the Ombudsman concluded that Parliament had considered the issues raised by the complainant, and had chosen to pass the Act in its present form.

But he also noted the solution suggested by the Select Committee – making an obligation to buy the freehold land a condition of the sale of the leasehold – and advised the complainant to consider pursuing this course of action.

CONSOLIDATED INDEX

This is a Consolidated Index of articles appearing in the most recent 14 issues of the Ombudsmen "Quarterly Review" - running from March, 1996, to June, 1999. The first number is the folio (year) - with 2 being 1996, 3 being 1997, 4 being 1998 and 5 being 1999 - and the second number is the issue (quarter). For reasons of space, all references to the first year (1995) have been deleted from the Index.

Benefit –
- Relationship that has stopped being personal should have no impact on a benefit 4-3.

Commercial –
- Always check the details 4-2.
- Information about joint ventures 3-3.
- Requests for details about consultants and their fees 3-2.
- What is a "commercial activity?" 3-2.

Education -
- Gross misconduct by students must be "gross" 3-1.
- Non-custodial parent and the school prize list 5-2.
- Student loan not enforceable if student never enroled 4-3.

Health -
- Not all health information is private 3-1.
- When information can be withheld 2-3.

Immigration -
- Approvals, permits and visas 2-3, 5-3.
- Refusal because of drugs 3-1.

Insurance -
- Building a house 2-4.

Local authorities -
- Building plans not always confidential 3-3, 3-4.
- Care needed with conditions 3-4.
- Charges and fees 3-4.
- Deed of confidentiality 5-2.
- Invoicing in advance 2-1.
- Non-notified resource consents 2-1, 4-4.
- Specific or blanket information 2-3.
- Trees need to be "notified" to be saved 4-3.
- Workshops not covered by Ombudsmen Act 3-2.

Official information -

*All of **4-1** is devoted to official information, including checklists for requesters and holders.*

- Approach for information needs to be direct 4-2.
- Attitude of openness 4-2.
- Charging for information 2-1, 5-1.
- Common sense v letter of the law 3-4.
- Confidentiality in out-of-court settlements 2-2.
- Improper gain 2-1.
- Informants' names may be kept confidential 3-2.
- Information needs to be more timely 3-1.
- Information that could prejudice 2-3.
- Legal professional privilege 2-2, 4-3.
- Non-documentary information 4-3.
- Private information held by politicians is not official 2-4.
- "Public interest" or of interest to the public 5-2.
- Some Government agencies not covered by OIA 4-3, 5-2.
- Specific or blanket information 2-3.
- Waiver of privilege 2-2, 2-3.
- When information is "held" 2-1, 5-1, 5-2.
- When requests may be transferred or delayed 2-3.

Ombudsmen's Office–
- Actions must conform to "reasonable" standards 4-4.
- Impacts of new legislation 2-2.
- Onus on Government agencies to get facts right 4-4, 5-1.
- Oversees administration not law or policy 4-4, 5-1.
- Reviewing role 5-2.
- Regional clinics 2-2.
- Use of the term "Ombudsman" 5-2.

Parliament -
- Not bound by Official Information Act 2-1.

Police -
- Videotapes not public 3-1.
- Internal documents may be withheld 5-2.

Prisons –
- Charges for escorted leave 4-4.
- Details of prison visits disclosed 4-2.
- Disclosure of parole details 3-2.
- Entitlement to Steps to Freedom grant 2-1.
- Manual must be made available 4-4.
- Theft in gaol may be prison's responsibility 5-1.

Privacy -
- Availability of names and employment details of officials 4-4.
- Confidentiality of box-holders' addresses 2-2.
- Need for confidentiality can override right to know 3-3.
- Police videos not public 3-1.
- Privacy and mental illness 5-1.
- Protection of privacy 3-4.
- When privacy applies 2-1.

Superannuation –
- Complainants against ISS need to persist 4-2.
- Organise business in advance 3-4.

A HORROR STORY

photographer had occasion to send some of his own original artistic work to Creative New Zealand. It included the negatives as well as prints, and reflected 20 years of professional labour.

CNZ arranged for an assessment of the work by an external expert. A heavy package containing the work was duly despatched by courier to the expert, and was duly signed for on delivery. The name of the intended recipient was on the package, as was the return address. But two numbers of the address were transposed and the courier took it to the wrong house.

A person at the address to which the package was delivered, seeing that the name on it was not that of the householder, placed it for rubbish collection. It was duly collected and destroyed.

The material was irreplaceable, and the photographer wanted to establish how it had come to be lost, including the name and address of the householder of the property to which the package had been wrongly addressed and who had put it out to be trashed.

CNZ sought to withhold this information pursuant to s9(2)(a) of the Official Information Act, in order to protect the householder's privacy. The householder did have a privacy interest in his name and address so s.9(2)(a) did apply.

However, s.9(1) of the OIA makes it necessary to consider whether *"in the circumstances of a particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available."*

In this case, it was in the public interest for a person in the position of the photographer to know the circumstances of his considerable loss, and in being in a position to consider whether any legal action by him against any party was appropriate – irrespective of the likely success of any legal action.

After consultation with the Privacy Commissioner, it was decided that CNZ release to the photographer the details of the case, but not the name and address of the householder.

However, the householder subsequently publicly identified himself by writing an editorial based on the incident in the magazine of which he is the editor.

THREAT WHERE NONE INTENDED

"I know you believe you understand what you think you heard me say,
….but I wonder whether you realise that what I said wasn't what I meant."

Care needs to be taken that the words used in correspondence mean what the writer intends them to mean.

The Ombudsmen from time to time have complaints referred to them based on an exchange of correspondence where the receiver has taken a meaning that the writer subsequently says they did not intend.

In one such recent case, an elderly woman needing suitable accommodation and her solicitors were in correspondence with a local authority. The council had sold to the woman an individual unit in its pensioner housing complex under the terms of an agreement which virtually guaranteed repurchase by the council. When the time came to exercise this, the parties disputed the valuations.

In the course of fairly terse correspondence, the council warned that if the transaction could not be completed, then it would consider withdrawing its offer to purchase the unit. This remark was seen as something of a threat. It seemed to cause considerable distress to the elderly and infirm complainant. Her solicitors responded that the council was bound by its exercised option and was not in a position to withdraw unilaterally.

When told of the perception its threat had caused, the council denied that intention. It said the remark objected to had been intended as an indication that, if she were not satisfied with the valuation, which the council had commissioned, then the woman might want to ask the council to release her from her contract of sale so she could sell the property herself and perhaps achieve a price she was happier with.

This statement of council intention had not been explained to either her or her advisers at the time. When this apparent mis-communication came to light, the council apologised for any distress caused and to recognise this made a modest ex-gratia payment to her – because of the distress a vulnerable person might feel and towards her legal costs in responding to the perceived threat.