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Editorial

PROCESSING OFFICIAL INFORMATION ACT REQUESTS DURING PERIOD OF CARETAKER GOVERNMENT

The outcome of last month's General Election immediately raised an issue of how a change of government impacts on the processing requests for official information or existing reviews by Ombudsmen under the Official Information Act.

The convention on caretaker government is founded on a basic principle of New Zealand's system of responsible government. This is that the government must have the confidence of the House of Representatives to stay in office. However, on occasions such as after a general election where the incumbent government no longer has sufficient support to continue, the incumbent government may need to remain in office on an interim basis until a new administration is sworn in. In such a situation guidance on how a caretaker government should proceed with decisions under the Official Information Act are detailed in a Cabinet Office Circular published on 21 April 1999 (CO(99)5).

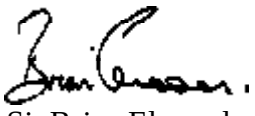
In summary, the guidance in respect of new requests is that:

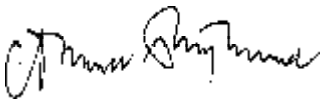
- on rare occasions, requests may raise issues which are likely to be of long-term significance for the operation of government and which require Ministerial involvement, possibly extending to consultation with the incoming Minister;
- Ministers, Departments and Crown agencies subject to the Act should, as far as possible, continue to deal with official information matters in the ordinary way;
- in general, responding to requests for information should be seen as part of the day to day business of government; and
- the Official Information Act continues to operate.

However, the transition from caretaker government to new Government also impacts on decisions by Ministers in respect of requests for information. The Official Information Act distinguishes between decisions made by a Minister acting in his or her official capacity, and those by departments and Crown agencies subject to the Act.

A Minister's decision is essentially a personal one. An incoming Minister is not automatically responsible for Official Information Act decisions made by his or her predecessor. The incoming Minister must be free to make his or her own decision on the request. Therefore, once the incumbent Minister, whose decision is under review, leaves office, an Ombudsman's investigation and review of that decision cannot achieve a practical outcome. The person responsible is no longer subject to the Act.

Unless, an Ombudsman's current investigation and review can be finalised or otherwise resolved during the caretaker period, there is little option but to advise complainants that they should make a fresh request to the new Minister.





Sir Brian Elwood
Chief Ombudsman

Anand Satyanand
Ombudsman

Sir Brian Elwood New IOI President

The Chief Ombudsman, Sir Brian Elwood, has been elected President of the International Ombudsman Institute (IOI) at a meeting of the IOI directors held recently at Pretoria, South Africa.

The IOI was set up in 1978 and is the professional body that represents 164 Ombudsmen institutions worldwide from just under 100 countries, with its headquarters in Canada.

Sir Brian was appointed an Ombudsman in 1992 and made Chief Ombudsman in 1994, becoming a member of the Institute's Board of Directors in the same year. He was previously Mayor of Palmerston North, member of the former Wellington Harbour Board, President of the Municipal Association, Chairman of the Local Government Commission and Commissioner of the Wellington Area Health Board.

"The Institute's membership has doubled in the last four years as growth in the number of Ombudsman institutions around the world has escalated quite dramatically," Sir Brian said. "The New Zealand model of an Ombudsman institution has been drawn upon in many parts of the world. An increasing number of countries have established the Ombudsman institution to review Government administration, as they pursue democratisation of their Government systems."

Growth had been greatest in Eastern Europe, South America and Africa.

"The fact that this year's annual meeting of directors was held in South Africa, and that the next four-yearly international conference of Ombudsmen is also to be held there, indicates the support of Ombudsmen worldwide for the trend to democracy, in South Africa in particular – the Ombudsman in South Africa is known as the 'Public Protector' - and in Africa generally," he said.

Withheld Information Must Be Kept

If official information is destroyed before an Ombudsman can review a refusal to publish it, requesters will effectively have been denied their rights.

Organisations subject to the Official Information Act or the Local Government Official Information and Meetings Act need to take care that information withheld from a requester is not disposed of before the requester can seek an Ombudsman's review.

This still applies notwithstanding that it may be information that is normally disposed of at regular intervals in accordance with some established internal policy or procedure.

At recent example of this arose when a requester sought a copy of a draft document from a local authority. The request was refused and the draft document destroyed shortly thereafter when the final version of the document was prepared. This was normal practice for the local authority concerned.

Destruction of the information meant that no Ombudsman's opinion could be formed as to whether the decision to withhold was valid. By destroying the information, the council had denied the requester's statutory right to have the decision to withhold reviewed.

It was accepted that the information had not been disposed of in any deliberate endeavour to subvert LGOIMA, but through an administrative oversight. However, a local authority should retain withheld information long enough to allow a requester to seek an Ombudsman's review. This advice was accepted unreservedly by the organisation in question.

Identity Conditional on Release of Official Information

It may be appropriate on occasion to impose conditions on the release of information to a requester.

A request was made by an individual to the Police for copies of all information relating to a complaint he had made to them, and asked that it be sent to a Post Office box address.

The Police were willing to release most of the information sought. But as it contained *"personal information"* about an identifiable individual, the Police also wished to assure themselves that the individual requesting the information and the individual who was the subject of the information were one and the same person.

The requester was advised that release of the information to him was subject to the condition that he go to a local police station to verify his identity. The requester did not wish to do so and complained about the condition the Police had attached to the release of the information.

The Ombudsman inspected the information at issue and noted that it did indeed contain personal information about a particular individual. He formed the view that the condition imposed on the requester had been a proper one.

FROM THE 1998-1999 ANNUAL REPORT

PUBLIC SECTOR TRAINING ON OIA OBLIGATIONS INADEQUATE

There is a need for public sector agencies to give greater emphasis to training their staff to be aware of and understand the legal obligations imposed by the Official Information Act .

There were a number of contributors to this situation:-

- Many public sector agencies conduct little or no training on the duties and responsibilities of staff under the Act.

- Many such agencies rely, inappropriately, on the under-resourced Office of the Ombudsmen to meet what is their, rather than our, statutory obligation to train staff.

There was no good reason to withhold any of the information sought in 190 (17%) of the 1112 reviews completed under the Act last year, and it was released as a result of the investigation. The same absence of good reason was found in 23% of requests under the Local Government Official Information and Meetings Act.

While agencies are willing to release information without the need for a full investigation, there is room for improvement in the original decisions when requests for the information are made. There was an increase in the number of cases where some Ministers of the Crown and some public sector agencies had failed to comply with the time requirements laid down in the legislation. Although these numbers may not be large, considering the overall volume of administrative actions and decisions by public sector agencies, there is an ultimate cost if there is a lack of confidence in those agencies which results in their decisions having to be reviewed and perhaps reversed or changed. There are no sanctions provided for failing to comply with the time requirements, but disregarding the spirit and intent of the legislation undermines the integrity of public sector processes and public confidence in them.

During the year there was a significant drop in the number of official information complaints generated by the Parliamentary system, down from 268 to 140, but this was partly offset by an increase in the number of complaints from individuals. The Ombudsmen completed 141 fewer investigations during the year than in the previous year.

This reduction can in part be attributed to the effects of sustained high caseloads, the growing compexity of cases, staff turnover and the time it takes to train new investigating staff.

The Ombudsmen faced serious pressure on their resources, with consequent impacts on the ability of the Office to operate effectively. Planning for clinics to outlying centres had to be deferred, prison visits curtailed and staff training reduced. Notwithstanding the reduction in the number of complaints received, the workload and pressure on the Ombudsmen remains high.

It may be possible to manage some of the pressures of demand better, but it is not possible to restrict a citizen from exercising rights given by Act of Parliament. Those rights are an integral part of an open, accountable and participatory democracy. It is the cause of the demand that needs to be addressed. The fact that citizens continue to lodge complaints with the Ombudsmen signals that there is a sustained level of public dissatisfaction arising from the way in which some public sector agencies relate to the public.

The combined effects of an increased workload and inadequate resources was recognised by the Officers of Parliament Select Committee last year. The Committee concluded that *"without increased funding or changes to the legislative framework"* the sustainability of the Office was at risk.

The Committee considered a general legislative review was needed to pursue options to reduce the demands on the Office. It recommended that, in particular, four options be looked at:-

- A wider discretion for the Ombudsmen either to decline to investigate complaints or to discontinue investigations;
- Introduction of cost recovery for certain areas of the work of the Office;
- Limiting the Ombudsmen's role in dealing with prison complaints to those of a serious nature; and
- Provision of a linkage between the Office and cabinet processes.

However, as the Committee noted, the underlying problem is the level of the workload.

Breach of Parliamentary Privilege Ruling

A representative of the news media requested a copy of a letter from a Minister of the Crown to the Speaker of the House over an alleged breach of Parliamentary privilege.

The Minister had refused to make a copy of the letter available, on the basis that the appearance before Parliament had been as an MP rather than as a Minister, so the information was not "official information." S2 of the OIA defines "official information" as including "*any information held by a Minister of the Crown in his official capacity.*"

The Chief Ombudsman upheld the argument that the letter concerned was not official information and so not subject to the OIA.

Whenever Ministers are in the House, they are subject to its rules as an MP. If it is alleged that an MP has broken a Parliamentary rule, there can be severe penalties. They are, however, answerable as an MP and not as a Minister. While the alleged breach may have arisen because the MP is a Minister (in that it is an answer to a Ministerial question that is under scrutiny), this is irrelevant. Ministers in Parliament have no separate status under Parliament's rules.

In this case, the Minister was writing to the Speaker about whether the Minister had breached a duty owed to the House as an MP. The letter was written in that capacity as an MP and not as a Minister of the Crown.

Rights of Access to Highway

property owner whose land fronts a public highway has rights of ingress and egress at all points along the highway boundary, subject only to any statutory limitations.

In a case referred to the Chief Ombudsman, the owners of a property with a street frontage informed the territorial local authority that there had been an unauthorised planting of shrubs on the road berm along the front boundary of their property. This planting had been done by a neighbour living immediately behind the front property, and the owners of the front property wanted the council to require the neighbour to remove the planting.

Under the Local Government Act, 1974, road reserves are under the control of territorial local authorities and this council's standard requirement was that road berms were to be sown with grass. It did occasionally approve other forms of beautification – such as garden planting – but this had to have the consent of the owners of the property affected.

There were different accounts as to whether or not that had been obtained in this case, with no clear evidence available to support one side against the other. The affected owners of the front property continued to object strongly. The council, therefore, required the back neighbour to remove the planting within a specified period and, when this was not done, it removed the planting itself. The back neighbour's complaint against the council's actions was not sustained.

No Embargo Because of "Possible Public Misunderstanding"

There have been instances where local authorities have incorrectly sought to embargo the publication by the news media of agendas and reports made available under section 46A of the Local Government Official Information and Meetings Act. In one case, the argument put forward to support this approach was that "*public misunderstanding*" would result in the event that a council decision was different from a report's recommendation.

S46A provides that: "*(1) Subject to subsections (6) to (10) of this section, any member of the public may, without payment of a fee, inspect, during normal office hours, within a period of at least two working days before every meeting, all agendas and associated reports circulated to members of the local authority and relating to that meeting.*" Subsections (4) and (5) allow for members of the public to take notes from such items and obtain copies on request.

The Ombudsmen's view is that where agendas and reports are made available under s46A, no embargo can be placed on the publication of these items during the two working days before the meeting in question. LGOIMA contains no explicit or implicit restriction on the publication of material in agendas and reports, and neither are there grounds for saying that members of the news media cannot exercise their rights under s46A fully. In fact, s46A provides *that bona fide* members of the news media shall be deemed to be "*members of the public*" for the purposes of Part VII of the Act.