

Editorial

Contracting out and the OIA

In recent years, there has been an increasing trend for public sector departments and organisations to contract out to private sector agencies the task of storing and retrieving, on request, information for which the department or organisation is responsible.

This has resulted in some misunderstanding as to how the Official Information Act applies to requests for such information.

In a recent case, a department received a request for certain information. However, it had contracted with a private sector company to handle requests for information from the records in question. As a general rule, the department had adopted the practice of refusing to provide copies of records which could be obtained from the private contractor.

Requesters were advised to make their requests directly to the contractor. The department considered the information, which could now be requested directly from the contractor, was publicly available. It therefore refused a request under s18(d) of the OIA for the information, on the basis that the information was publicly available.

The department had overlooked the fact that, even though a third party had been contracted to process any requests for access to the information, the information was still deemed to be held by the department for the purposes of the Act. In this regard, s2(5) of the OIA states:

“Any information held by an independent contractor engaged by any department ... in his capacity as such contractor shall, for the purposes of this Act, be deemed to be held by the department.”

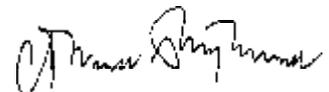
Contracting out responsibility for processing requests for access does not affect a department's individual accountability under the OIA. This remains the position even if a department contracts out the responsibility to hold the information physically, including the right to retrieve it on request.

Any request, whether made to the department or the contractor concerned, must be considered under the OIA. If there is no good reason for refusal under the Act, then the information must be made available within the time limits specified by the Act. Similarly, any charge fixed by the independent contractor for supply of such information must be reasonable in terms of s15(2) of the OIA.

So, if contracting out the storage or retrieving of information is being considered by departments or organisations subject to the OIA, they must ensure that the independent contractor is aware that the obligations of the department or organisation under the Act, in respect of requests for access to information held by the independent contractor, must be complied with.



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Chief Ombudsman



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Official information should not be degraded when released

Official information is often made available to the requester with words identifying that it had been “released under the Official Information Act.”

An unusual situation arose when a researcher had asked Work and Income New Zealand (WINZ) - now DWI - for a high quality copy of a Departmental video.

The request was originally declined on two grounds – that the technical nature of the type of copy requested was digital and therefore able to be manipulated, and that the information might be manipulated in such a way as to disadvantage the Department. The Ombudsman was asked to intervene.

The researcher maintained that it was not necessary for the Department to know the purpose for which the information was requested or for the particular form sought, but gave an assurance that it was not for the reason the Department feared – that the researcher might make “improper use” of the material.

The Department confirmed that it held the copyright to the video, but was unwilling to release it without knowing what the researcher wanted it for.

The researcher was offered a chance to view the video on the Department’s premises, but declined.

The provisional view was formed that the information contained in the video could and should be released to the researcher upon the basis of s5 of the Official Information Act – “*that information should be made available unless there is good reason for withholding it*” – and the Ombudsman was not satisfied in this case that such “*good reason*” existed.

The researcher then wrote to the Ombudsman again saying that although he had received a video, it was not in the form he had requested, and had been degraded so it could not be used.

He complained that the Department had “deliberately degraded” the image of the video by superimposing across the screen – diagonally, from corner to corner, in large red outline – the words “RELEASED UNDER THE OFFICIAL INFORMATION ACT.” When this was brought to notice, a copy without superimposition was supplied by the Department.

Local Council Responsible for Damage

Where a local council has contributed significantly to damage to its own property, it will find it hard to succeed in proceedings against other parties.

A resident was billed by her local council for substantial damage to a fence at a council park following a car accident. Her explanation was that she had been obliged to take evasive action while making a right-hand turn and discovered two large containers blocking her path.

She was threatened with legal action by the council and also a possible consequence to her credit rating, in spite of the contribution of the council to the blocking placement of the containers. She complained.

It emerged that the council had itself authorised the placement of the containers, subject to the display of appropriate road signs. These never appeared. When the council realised its role, it agreed to review its decision to proceed against the resident. The council did not accept responsibility for the accident, but cancelled the alleged debt.

A dispute over costs arose subsequently, but that did not fall within the Ombudsman’s jurisdiction.



IRD needs to record taxpayer obligations

Where a verbal or informal arrangement has been reached by the Inland Revenue Department with a taxpayer, this needs to be recorded in writing to set out the taxpayer's obligations.

When such arrangements are not entered into it may lead to unfairness, especially in the case of a taxpayer who may suffer from some psychiatric condition, be addicted to alcohol or drugs, or otherwise be impaired.

The Ombudsman was approached by a solicitor on behalf of a client whose debts to the IRD – that had risen from about \$29,000 to \$169,000, a difference of \$140,000 – were escalating out of control and beyond the taxpayer's capacity to meet them.

He decided that on all the occasions the IRD had had informal dealings with the taxpayer it should have put in writing the many arrangements it had made. That would have enabled the taxpayer to appreciate his obligations fully, to keep a proper record, and also to use the correspondence to get advice from professionals or even friends and family.

The Ombudsman formed the opinion that an instruction to put in writing all arrangements reached with taxpayers should be part of the IRD Manual. In view of the special circumstances of this particular case, the IRD agreed to waive a small part of the escalating penalties that had followed and were continuing to follow non-payment of the debts.

One of the directions of the Report of Parliament's Finance and Expenditure Committee *Inquiry into the Power and Operations of the IRD* (May 2000) was that the IRD "issue clear directions to taxpayers as to their options, rights and obligations for repayment arrangements," which supported the Ombudsman's view.

Prudent Release of Information

When there is a significant amount of material on file with a Government agency for which there is no good reason under the Official Information Act to withhold it, then copies of the information should be released.

But where the nature of the material reasonably requires a Department to take steps to ensure the information is secure, then prudent steps must be taken to ensure it is secure.

There was an application to a particular Department for information to which the applicant had a right of access, but which involved others than just herself. The Department declined to provide it because the applicant did not have a secure address (simply an address care of a Post Office) from which to uplift it.

The Ombudsman upheld the Department's refusal and declined to continue investigating the matter unless and until the applicant could provide the security required.

Inmate security reviews must be consistent

A prison inmate who had played a part in a disturbance at a southern jail had subsequently been the subject of several inconsistent security reviews and was finally returned to his home region.

After the disturbance, he was transferred to a prison with a similar security rating before being moved on to a less secure institution. When he came to the notice of that prison's management, he was transferred to a more northern maximum security facility.

There had been several factual errors made during the course of his security reviews. The other principal inmate involved in the original disturbance had never been transferred from the scene of the incident, and was being held in much more favourable circumstances.

The Ombudsman considered that in view of the inconsistent security reviews - he described that of one prison as "a clear error of judgement," while that of another prison had contained "at least three separate errors" - the inmate should be returned to his home region.

Informal Approach Sometimes Best

An informal approach by an Ombudsman sometimes helps resolve a situation where the deteriorating relationship between the complainant and the agency has been contributing to the failure to find a resolution.

A district council had been asked for a list of names and addresses of users of the local rural water supply, which had been refused on the grounds of privacy.

The background to the request was that the council had, over the years, sponsored an informal users' committee representing the interests of users, which was elected annually at a relatively informal meeting of the users.

The council had been considering making substantial changes to the water supply service with (allegedly) only limited reference to the committee.

Some members of the committee were concerned about the proposals and, wishing to promote wider discussion, wanted to disseminate these proposals to affected parties. Hence the request for names and addresses and, when they were refused, a subsequent complaint to the Ombudsman.

On inquiry, the Ombudsman learned that the council had traditionally mailed a notice of committee meetings to the users concerned. It was therefore suggested to the council that, in line with this practice, it might consider a mail-out to those people of the material the complainant had wished to disseminate. This the council agreed to do.

This resolved the complaint without needing a formal and time-consuming investigation under the Official Information Act. It also improved an increasingly fraught relationship between the complainant and the council.

Early Communication can be Helpful

If parties to a dispute can establish informal communication early on, that can defuse the issue before involving an Ombudsman, or at least make its final resolution a lot easier.

A member of a student body, dissatisfied with certain actions of one his tutors, brought a formal complaint to the institution's authorities which he expected to be addressed in accord with that body's normal complaint resolution processes.

This did not happen partly (it emerged later) because of misunderstandings or communication breakdown. The student's frustration increased to the point where he felt it necessary to lodge a second complaint – against those handling the complaint procedures.

Investigation of the two complaints by the Ombudsman revealed that while the institution was prepared to deal through its normal procedures with the original, substantive complaint, the complainant had lost faith in those procedures and was not prepared to deal with those responsible for implementing them.

Finally, the Ombudsman suggested to both parties that they allow the dispute to go to a mutually acceptable third party. This was agreed to, such a third party was found, and the Ombudsman's involvement ended.

Had both parties been willing to talk informally, once an impasse had been reached, and to focus on finding solutions, a great deal of their time and effort could have been saved.
