

Editorial

Obligations of Confidence and the Official Information Act

Public sector departments and agencies often receive requests for information which is said to be subject to an obligation of confidence. Such an obligation generally arises in two circumstances. First, it can be implied out of the nature of the information or from the context in which it arose. Secondly, it can be express, where recorded in a confidentiality agreement or clause calling for confidentiality where the supplier of the information is a third party who may not be subject to the Official Information Act.

In several recent cases, we have seen evidence that there is still a wide perception that requests for information can be refused under the OIA simply because the information is subject to an obligation of confidence. That is wrong. Under the official information legislation, it must also be shown that disclosure of the information:

"... would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or

... would be likely otherwise to damage the public interest."

Even when all these requirements are met, the holder of the information must also consider whether, in the circumstances of the particular case, the need to withhold is outweighed by other considerations which render it desirable, in the public interest, to make the information available – s9(1) of the OIA and s7(1) of the Local Government Official Information and Meetings Act refer.



Public sector agencies and third parties that supply information to such agencies cannot contract out of the obligation to make information available unless there is good reason under the OIA legislation to withhold it. In this regard, the High Court in *Wyatt Co v Queenstown Lakes District Council* [1991] 2 NZLR 180 noted as follows:

"There cannot be allowed to develop in this country a kind of commercial Alsatia beyond the reach of a statute. Confidentiality is not an absolute concept admitting of no exceptions. ... it is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations."

Confidentiality agreements remain a widely-used means of recording the understanding of parties to the agreement that certain information should be held in confidence. Certainly, they are helpful in confirming the express intention of the relevant parties as to obligations of confidence. However, confidentiality agreements in respect of the disclosure of official information are subject to the relevant legislation.

Whether official information can properly be withheld under the official information legislation turns on a number of factors, and not just on whether the information is subject to an obligation of confidence. In other words, a number of steps may be involved – consideration of what type of confidentiality, whether the grounds to withhold have been made out in terms of the OIA, and what may constitute the public interest in the matter.

Sir Brian Elwood
Chief Ombudsman

Anand Satyanand
Ombudsman

Requests for Personal Information – the Official Information Legislation or the Privacy Act

There is confusion in some quarters over the relationship between the Privacy Act (PA) on the one hand and the Official Information Act (OIA) and Local Government Official Information and Meetings Act (LGOIMA) on the other.

Two recent cases brought to the attention of the Ombudsmen illustrate that. Each case involved a different local authority, but the circumstances were similar.

The people concerned had sought information about themselves which had been considered at local authority meetings from which the public had been excluded.

Both requests for information had been refused under s 7(2)(a) of LGOIMA, which provides for withholding information where this is necessary “*to protect the privacy of natural persons ...*” Quite understandably, the requesters questioned the validity of refusing requests under this provision when the information sought was about themselves.

The grounds for refusal given in each case were merely repetitions of the reasons recorded for each of the councils going into sessions from which the public was excluded.

However, any request for information, whether or not that information was considered in committee, must be considered on its own merits. When a “*natural person*” requests information about themselves, such a request is deemed to have been made under the Privacy Act and not under the OIA or LGOIMA.

Both the Ombudsmen and the Privacy Commissioner have said this on many occasions in recent years. Information to this effect has been published in the Ombudsmen’s *Practice Guideline No. 6* and the Privacy Commissioner’s *Fact Sheets*.

The two recent cases underline the need for any organisation to give reasoned and careful consideration to each request for information on its own merits.

The Ideal is Not Always Possible

A rural resident served by a gravel road approached the local authority about the poor condition of the road surface, describing it as being “corrugated from one end to the other, with frequent potholes.” He wanted it upgraded, preferably sealed, and approached the Ombudsmen when the council declined to act.

A local authority is under no legal obligation to maintain roads to any particular standard, although it is required to take all sufficient safety precautions. Residents can reasonably expect a council to do what it can within its resources to maintain acceptable standards for commonly-used access roads.

Sealing the road did not seem to be an option for the immediate future, in this case. The council did not have a current sealing programme which included the particular road and the residents were not in a position to fund the project privately.

The council found that extremely dry or windy conditions increased the loss of fine material from the road surface, so that traffic use caused it to deteriorate further. It decided to remetall the road with a material with a higher clay content, to improve the life of the surface between grading cycles. The residents agreed that this new surface material improved the quality of the road.

Although sealing the road was the preferred option, the action taken proved an acceptable compromise, given the resources available.



Duplicate Requests for Information

It is not sufficient to refuse a request for official information on the grounds that, in the opinion of the agency, "the requester usually makes duplicate requests" to another agency.

The requirement under s15 of the Official Information Act is to respond to any request for official information "*as soon as reasonably practicable and in any case not later than 20 working days after the day on which the request is received.*"

Ombudsmen have noted in similar cases previously that it is open to the requester to make the same request to different organisations, as those organisations may hold different information.

Responses may be co-ordinated, with different agencies taking responsibility for different information, but each agency should make its own formal response even if, under s14 of the OIA, an agency advises that it is referring the request in whole or in part to another agency. That should occur no later than 10 working days after the agency has received the request.

Whether or not the request is perceived as being a "duplicate," that does not absolve the agency from the requirement to comply with the OIA.

Consent Given in Error

A dispute arose between two neighbours after one of them, who had applied for a consent which the local council had granted, built a pergola extension and swimming pool fence close to their common boundary.

The consent was granted in error, as both structures infringed the council's bylaws. The council tried to get around this by bringing the parties to a meeting and drawing up an "agreement" for them to sign. This document was not drafted clearly and the two neighbours had a different understanding of it.

The Ombudsman was approached to require the council to enforce its own bylaws. At first, the council maintained that the "agreement" validated its own infringements. It later acknowledged that it had contributed to the situation and memoed its staff to remind them of the level of care needed when managing consents.

Although the offending structures were not removed, the complainant expressed some satisfaction at having had his stance confirmed.

WHISTLEBLOWER LEGISLATION

Legislation designed to protect disclosure in the public sector, including Crown entities and local government – and in the private sector too – comes into force on 1 January, 2001. This has the capacity to provide a greater workload for managers and for the appropriate authorities set up to deal with whistleblowers.

The purpose of the Protected Disclosures Act, 2000, is to promote the public interest by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organisation and to protect employees who, in accordance with the Act, make disclosures of information about serious wrongdoing.

The Act encourages disclosure to be made within an organisation. All organisations are expected to establish internal mechanisms to deal with applicants seeking to disclose.

Where a disclosure is not made within the organisation, there are 12 appropriate authorities established to deal with the matter – of whom an Ombudsman is one.

An Ombudsman must supply information and guidance on request to any potential discloser of information or person who has already made a protected disclosure. Public sector organisations are required to have appropriate internal procedures in place for receiving and dealing with information about serious wrongdoing in those organisations.

An Ombudsman is the only appropriate authority for disclosures from the Department of the Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Ministry of Defence and the New Zealand Defence Force.

Employees making a protected disclosure are immune from civil or criminal proceedings or disciplinary action, but not if they have supplied false information or acted in bad faith. Employees also have personal grievance rights in the event of retaliation against them, and have the benefit of what can be called the anti-victimisation provision s. 66 of the Human Rights Act, 1993.

There is no size limit on an organisation, whether in the public or private sector, that may be the subject of a protected disclosure; the minimum requirement is one employer and one employee.

The Ombudsmen's Office has produced a pamphlet describing its role in the administration of the Act.



Ministerial Inquiries and Official Information

Decisions or orders made by a Ministerial Inquiry do not affect the application of the Official Information Act (OIA) to official information.

Obligations to which a Department may be subject as a party appearing before a Ministerial Inquiry do not derogate from the obligations imposed on the Department by the OIA. This remains so unless the availability of official information is specifically restricted by statute.

During the hearing of the Gisborne Cervical Screening Inquiry, the Inquiry indicated that a document produced to it by the Ministry of Health should be made available only if the laboratory named in the documentation remained unidentified.

The news media requested a copy of a document presented to the Inquiry by the Ministry of Health comparing smear reporting rates of various hospitals and laboratories - which included names of the laboratories.

The Ministry had declined the request relying upon s6(c) the OIA in that release “*would be likely to prejudice the maintenance of the law,*” maintaining that the Inquiry had directed the identity of the laboratories not to be disclosed and that, accordingly, withholding was necessary to avoid prejudice to the maintenance of the law. It was also argued that to disclose the information would be tantamount to a contempt of Court.

The requester complained to the Ombudsmen. The provisional view found that the Inquiry was not a Court, so that the issue of contempt in these particular circumstances did not arise.

It was accepted that s6(c) might provide grounds for withholding the information if the Inquiry had some statutory authority to determine the availability of information. However, the limited powers conferred upon the Inquiry for the purposes of its proceedings, under the Health Act and the Commissions of Inquiry Act, did not extend to any general power of direction concerning the availability of information held by the Ministry.

The Ministry, after seeking Crown Law Office advice, accepted the provisional view and released the information.



Lawyers and Journalists Outside Jurisdiction

The Ombudsmen do not have jurisdiction to act on complaints about private lawyers or journalists.

A complaint arose from an inmate after the prison in which he was incarcerated permitted a visit from a lawyer and a person who was introduced as a “*clerk*” but who was, in fact, a journalist. The visit to him led to an article in a nationwide magazine to which the inmate objected, in advance when he knew it was pending, and afterwards once it had been published. The inmate also complained about the role of the prison in allowing the meeting to take place. After investigating, the Ombudsman considered that in the circumstances the prison had acted in good faith in allowing the meeting.

The inmate further complained that adequate steps had not been taken to prevent the article being published.

Once the prison had identified the “*clerk*” as being a journalist it wrote to the editor of the magazine concerned. But the magazine editor responded that the resulting article would be published. The journalist denied any wrongdoing but, it is understood, has since been banned from visiting the prison. The Ombudsman concluded that the prison authorities had taken reasonable steps to try to prevent publication.

Because the Ombudsmen lacked jurisdiction over the actions of either lawyers or journalists in this case, the view reached was that the inmate’s concerns might better be directed to the professional bodies to which the lawyer and journalist are accountable.

