Address to MBIE Managers

Speaker: Chief Ombudsman Peter Boshier
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Venue: MBIE, 15 Stout Street, Wellington

The event

MBIE had an OIA week (9-13 April) to focus on lifting its performance and improving the quality of the OIA work it does. This is the keynote address.

Bringing the lamp of scrutiny to otherwise dark places

Tena koutou katoa.

Thank you Adrienne for your warm welcome.

I have to say that when I was invited to speak to the Ministry I was intrigued by the idea of an Official Information Act week.

It doesn't quite roll off the tongue like Māori Language Week or Privacy Week, but from my somewhat biased perspective, and clearly from yours, it is by some distance the most important week of the year.

That said, I note that the Ministry has seen a large increase in OIA requests in the past couple of years and I applaud the work that has been put in to manage these requests.

I'm also pleased that MBIE has signed up to a model protocol on dealing with OIA requests involving Ministers – this is an important step in ensuring transparency and making sure there are defined protocols in place.

Finally, I also commend you for exploring ways to make best use of the State Services Commission OIA capability self-assessment tool to assess your capability, and see what further improvements can be made.

Personally, I'd like to see initiatives such as these, and your OIA week, taken up by more agencies – continuous improvement and a better understanding of the legislation will ensure that public sector accountability will improve.

To this end, I'm aware that the profile of the Office of the Ombudsman is climbing, but the clarity around what we can, and cannot do, is rather less.

A Canadian judge has characterised the work of an Ombudsman in this way:

An Ombudsman brings the lamp of scrutiny to otherwise dark places even over the resistance of those who would draw the blinds.

Lyrical certainly, and to an extent true, but for an Ombudsman to successfully carry the lamp of scrutiny to those dark places, the public needs to know us and understand us.

Which is why our annual research carried out in May last year very much concerned me.

It showed that 94% of the over-60s had heard of the Office, but only 23% of under-30s had, and that despite a five per cent improvement on the previous year's survey.

It will probably not surprise anyone that those on higher incomes generally had a better understanding of our work, but what surprised me was that regionally, Auckland had the lowest awareness.

In part, this is possibly due to the area's large Pacific and Māori communities, often the most vulnerable in our society, who also had a lower understanding of what we do – again these figures are improving, but it is clear, this is an area in need of improvement.

So plenty for my Office to do but also plenty for agencies as well – I am not trying to unfairly share the burden here, as I think it is incumbent on every public sector agency to make sure all members of society have good access to a transparent request and complaint framework.

I look forward to the outcomes of this year's research as much for information as for guidance as to what steps we all can take to make the OIA a more effective piece of legislation for the very people it was written for – New Zealanders.

Getting these fresh results should coincide with our celebration, on 1 July, of the jade anniversary of the OIA coming into force. In those 35 years an awful lot has changed, both for society and in terms of the Act.

And I have to say that neither the Act, nor the work we do is at all jaded.

I would surmise that the Act is in fact more relevant today as it was when it replaced the Official Secrets Act, an Act which made the release of information held by Government agencies an offence – how the worm turned that day in 1983!

And we are lucky in New Zealand that this 180 degree turn was made all those years ago – the OIA now stands as one of the lynchpins of openness and accountability in our democracy.

But this has been influenced by many factors – MMP and state sector reform have changed the way we are governed, and the way the state sector delivers services and interacts with the New Zealanders.

And what of technology? It has evolved with amazing speed in the last 3 ½ years, let alone the past 35.

And these advancements have changed public's expectations of the breadth of information they believe should be readily accessible, in forms they can use and reformat and reuse and importantly, the speed at which that information is delivered.

So our challenge now, and in the coming months and years, is to manage those expectations in the moment, in a way that is current for the time they being dealt with.

This is something my Office has been dealing with over the past couple of years.

We've put a sharp focus on early complaint resolution which in turn has freed up resources for more complex complaints and investigations.

And critically, it has allowed us to attend to the backlog of complaints that had sat, unresolved, many for over a year.

In December 2015 the number of complaints in the backlog stood at 659 – I'm pleased to say that backlog was cleared on Tuesday, more than 14 months ahead of schedule.

Our clearance rate for all complaints, as at the end of February, was 119% meaning we are not only eliminating the backlog, we are able to make inroads into out 'business-as-usual' work and take on additional projects.

On top of this, we have made structural and operational improvements which I'd like to think has leap-frogged us well into the 21st century.

Now to give this sea change context, we need to go back two-and-a-half years when the previous Chief Ombudsman Dame Beverly Wakem released *Not a Game of Hide and Seek*.

This seminal report into agencies' OIA practices found that overall, agencies were motivated to be compliant with the Act - but that compliance and goodwill were not universal.

Too many agencies were simply either not complying with the law, both in terms of the content provided in a response and in the time taken to respond.

Others complied mechanically giving the bare minimum rather than intelligently asking themselves how they can best provide information and adequate context.

Some were frank about their practice of 'gaming' the OIA, particularly by interpreting the 20-day time limit as an opportunity 'put it off until the 20-day deadline' to either delay release or delay having to deal with the request.

This is clearly not acceptable in an open and participatory democracy.

Not a Game of Hide and Seek identified the need for adequate staffing and systems, strong leadership, and training – an example of this is the reason I am here today.

And so to our work with the OIA.

Our key task with the legislation is to improve the operation of the OIA – this entails:

- Quick and effective resolution and investigation of OIA complaints
- Publication of OIA data

- Advice, guidance and training for agencies
- Agency self-assessment
- Monitoring agencies' OIA practices and capabilities
- Collaboration with other agencies.

So what does this mean, in practical terms for the 4000 public sector agencies over which we have oversight?

In a nutshell, we are seeking to educate, and thereby improve the quality of OIA preparedness in the public sector, so that people and organisations making complaints have fair and reasonable access to information – and a place of redress should they feel they have been denied that access.

And this the goes to the heart of the Act – the principle that official information should be available on request, unless there is good reason to withhold.

The legislation sets out what those good reasons for refusal are – to the chagrin of some, political embarrassment or administrative inconvenience are not reasons for refusal.

As you probably know, the OIA sets out three main reasons for refusal – in brief:

- Conclusive reasons where issues such as national security, international relations or maintenance of the law are not subject to any countervailing public interest test;
- Good reasons such as the protection of personal privacy or the commercial position of third parties who have provided information in confidence to state sector agencies. This set of reasons require agencies to consider whether there are also any countervailing public interest reasons favouring release, before they can be relied on; and
- Administrative reasons, for example the information requested doesn't exist or can't be made available without substantial collation and research, or the request is trivial.

But one purpose of the Act is to progressively increase the availability of official information, enable more participation by the public, make Minister's and officials more accountable, and promote good government.

The key here is 'progressively' – the legislation explicitly states that – so what we are dealing with is a living document, not a static one.

Of course, there are caveats – the same section (section 4) speaks of protecting official information to the extent consistent with the public interest and the preservation of personal privacy.

So while the Act is a living document, it is also a complex piece of legislation, and one that presents challenges for agencies as it does for my Office.

But the Act is also a lynchpin of the openness and accountability that is vital in New Zealand being seen internationally as a world leader in government transparency.

To demonstrate this I want to quickly look at sections 6 and 9.

The overall assumption of the Act is that official information should be available to requesters.

Section 6 provides conclusive grounds for withholding such information, reflecting the major interests protected, such as security, defence, international relations, and some financial policies.

This section is reasonably clear cut, the public interest intentions to appropriately protect official information are obvious, and its implementation, I believe, well understood and accepted by most people using the OIA.

Section 9 sets out the grounds for refusal which should be balanced against competing public interests favouring release before they can be relied on.

These reasons include when release may cause prejudice to interests such as, a person's privacy, a company's commercial position, or the ability to exchange free and frank opinions, or the constitutional convention that protect the undisturbed consideration of advice.

This enables the agency, and the Ombudsmen on review, to take into account a variety of factors.

However where those interests are used to refuse information, they must be balanced with any public interest considerations favouring release of the information

Yet the OIA does not provide an exhaustive list of all the public interest considerations which might favour disclosure

As with many things, the definition of public interest evolves over time, and that is becoming even more acute in these days of social media and instant news.

Successive Ombudsmen (and the Act in its purposes in section 4) have held that there is a strong public interest in accountability – I endorse and follow that -, but also have to keep abreast of changing societal, policy and legislative requirements.

Let me give you a brief example of how we recently treated a case that was largely based on a strong public interest favouring release.

You may recall the case last year of American entrepreneur Peter Thiel who had been granted New Zealand citizenship as an exception under the Citizenship Act.

In early February, the Department of Internal Affairs released some information relating to Mr Thiel's citizenship application, but redacted the number of days he had spent in New Zealand for two periods prior to citizenship being granted under 9(2)(a).

The key words in this section are '*withholding of the information is necessary to protect the privacy of natural persons*'.

I accepted that Mr Thiel had some privacy interest in the information, with which the Privacy Commissioner agreed, but that this was outweighed by the high public interest in accountability and transparency in decision making in this case.

I therefore formed the final opinion that the Department did not have good reason under the OIA to withhold the number of days Mr Thiel had spent in New Zealand in two periods before being granted citizenship.

My final opinion was the request should not have been refused by DIA, and crucial issues in coming to that conclusion was the high public interest in the need for accountability and transparency of decision making.

I'd like now to turn to a topic that is often seen as the domain of the marketers and advertisers, yet which is something that is very relevant for anyone dealing with an OIA request.

To illustrate, I'd like to make a mention of the Local Government Official Information and Meetings Act, the OIAs twin piece of legislation, in particular of section 17 which mirrors the OIAs section 18(d) - that the information requested is, or will soon be, publicly available.

I bring this up for two reasons – first, I have already signaled to local governments that my Office will have a tighter focus on their obligations under the Act.

And according to the latest New Zealand Local Government Survey, the overall reputation of that sector remains poor.

My view is that local governments could start to reverse this trend quite simply by being more open with their residents.

Why is this relevant to the public sector and agencies like MBIE?

Because reputation matters – in fact, reputation is one of the biggest influencers we live with every day, and underpins trust and confidence, be it in a product, a service, or indeed an agency.

It should matter to local authorities, school boards of trustees, and of course the public service. As New Zealand's Ombudsman I am appointed to ensure Parliament and New Zealanders that they can have trust and confidence in those in executive power who make decisions that affect people are doing so fairly.

A decision must be made in logical relation to everything that has preceded it, including the potency of the case and the assembly of the facts.

As a decision maker, I might not always necessarily like the findings I reach.

I might think it would be nice if the evidence and analysis had led to a different conclusion, however, my responsibility is to get it right – fairness for all is not the same as pleasing everyone all the time.

Having said this, I am very conscious that the way we convey a decision can be as important as the decision itself – we need to acknowledge where needed that a decision may not please someone, and we must use language that is as warm and personal as possible.

I think people are far more accepting of a decision when they understand how it was made – they want to know whether all points of view were carefully considered before an opinion was formed.

In short, the robustness of the decision is crucial – it must give resolution, transparency wherever possible, and allow all parties to move on.

The second reason is that while agencies may want to enhance their reputation and ensure trust and confidence in what they are doing, in some ways they can't always control it – enter the media!

Now you may had seen earlier this week that my Office released our final opinion on the matter of the New Zealand Defence Force withholding information related to Operation Burnham in Afghanistan in 2010.

This is interesting for a number of reasons.

First, it was a high profile issue, especially given the book *Hit & Run*, written by Nicky Hager and Jon Stephenson, was published last year – this meant the issue was not only in the public eye, but had also been highly politicised.

The media have, over the past seven months, shown a great deal of interest in this story, it's many off-shoots and the part it has played or not, in shaping public opinion on the issue

So it was critical that the messages we sent out were clear, the rationale precise, and the final opinion finding was seen as considered and, accountable and transparent as far we could.

Now there will be some sceptics, but in an open democracy, I think we would expect the media to be using the same standards to inform and challenge.

Second, there were five separate complaints laid with our office – to have multiple complaints on an issue is not unusual in high profile cases like this ones.

All five complaints were slightly different, but with similar themes, so I decided to investigate these complaints together because of this overlap.

Third, our investigation required being privy to a lot of classified information, and also a very steep learning curve about this type of Defence Force operation.

This was one of the most significant investigations in which I have been involved, and certainly, it is the most sensitive from a security point of view.

Without choking you with detail, I formed the opinion that NZDF's refusal of the majority of the remaining information was justified under sections 6(a) and (b) of the OIA.

These relate to prejudicing New Zealand's security or defence, and prejudice to the entrusting of confidential information in the New Zealand Government by other governments or international organisations.

Now naturally NZDF were very cautious when determining what information they wanted to release, and rightly so.

But I did have one beef with NZDF – during the investigation they agreed to release some information additional to that already disclosed.

However, it didn't tell the requesters or my Office at the time the uploaded this information, and further where they placed it wasn't a prominent part of its website.

So in this case we have an agency doing the right thing by releasing information, but in a manner that could be seen as trying to bury it.

A key role my Office plays here is informing and educating the public sector on how the OIA works and how they can be more efficient and accessible to New Zealanders.

As I mentioned earlier, I am glad to say agency attitudes are changing – but there is still some way to go.

Now, my Office is not blind to the administrative burden that OIA requests can have on agencies, especially broadly framed requests that capture large volumes of information.

Agencies need to be pragmatic about where to draw a line in the sand on such request, and judge whether a reason for refusal applies or whether the interest in withholding is outweighed by the public interest in disclosure.

It is a fine line, and because every inquiry is different, I understand the difficulty, but I put to you that all parties subject to OIA scrutiny address such requests in the spirit of the Act as well as the legal requirements.

The spirit of the OIA is the principle of availability, and the more agencies comply with the spirit of the OIA, the less time and angst needs to be spent dealing with complaints downstream – as I say, we are encouraged at the progress being made by many, but not all, of them.

To aid this, my Office is, over time, building up a large suite of resources to help agencies – again, this type of proactive action is intended to assist agencies and guide them thought the OIA process.

They cover processes, interpretation of the Act, but they also address the underlying themes of accountability, transparency, and encouraging public participation in our democracy.

Our newest guides address the protection of confidential advice to government and free and frank opinions, and 'good government' withholding grounds under the OIA

There is also a guide explaining how the OIA applies to public policy making advice.

The model protocol for OIA requests involving Ministers, which as I mentioned MBIE has already adopted, sets out the scope and involvement of both parties, both to avoid both actual wrongdoing but also the perception of it, which can be just as damaging as the reality.

We published this model protocol following our investigation into alleged political interference with KiwiRail's release of the business case for the Third Main line in Auckland.

That investigation found no line had been crossed into political interference, but that KiwiRail could be open to criticism for some of its decisions.

This is not what any of us want – we see political interference, corruption and secrecy all too often around the world, and it is not the New Zealand way.

As an aside, right now, New Zealand sits atop the Corruption Perceptions Index, an international measure of perceived levels of public sector corruption.

We're above the Scandinavians, the Americans, the British, and of course our friends across the ditch, and on top is where we want to stay.

So despite all the wrinkles we have as a nation, a 'fair go' is still our bedrock – it's not written in any constitutional document, but legislation such as the OIA mean it is as enshrined as it can be.

In essence, there is an innate sense of societal decency embedded in the OIA, and ultimately this should improve accountability, transparency and, ultimately, the public's trust and confidence in executive government.

And this will help improve government policy and decision-making – the optimist in me sees this as a very encouraging route to a better, fairer, more open New Zealand.

The most extreme Pollyanna in me would mean there would eventually be no need for the Office of the Ombudsman, but even I acknowledge that that is many, many steps too far.

I will conclude with this thought – there is no doubt that at times the OIA can be a complex Act to work with.

But I urge you, as I do all other agencies, to see the OIA as an opportunity to engage and be open with their stakeholders – seeing it this way, rather than as a burdensome compliance exercise, is perhaps the real battle we all have.

Thank you again for asking me here today. It's been a pleasure to speak to you, and I'm happy to take your questions.