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Editorial

R E A L I S T I C T I M E F R A M E S F O R A C T I O N

Many requests for official information are time-sensitive. The purpose for which the requester may require the information can easily be frustrated if it is not available within a certain time. In such circumstances, it becomes important for departments and organisations to give requesters an early indication as to whether an urgent request will be granted and, if so, when the information will be available.

However, any time limit set for the release of information needs to be realistic. As recognised by s28(5) of the Official Information Act, undue delay in making available information is effectively a refusal to make available that information.

In a recent case, a Department told a requester that information sought would be made available by a specified date. Relying on that advice and confident that the relevant information would be available, the requester scheduled a meeting with another organisation for which the information was needed. Nearly two months after the promised date the information still had not been released in spite of several follow-up calls and assurances by the Department that release was imminent.

The requester complained to the Ombudsmen about the undue delay. Following informal enquiries, the Department promised that the information would be released in the *"near future"*. However, it was evident that this would not happen in time for the meeting and it had to be postponed, to the distress of the requester.

After nearly another month, the requester again advised the Ombudsmen that the information had not been received and the complaint was notified formally to the Department's chief executive.

The Department apologised for the delay and released the information. It explained that its relevant staff had a significant workload but acknowledged that the indication of time for release given to the requester and our investigating staff had been entirely unrealistic in the context of other demands on time. The Department accepted that the delay was unreasonable. It also accepted that the unrealistic assurances given were not only unhelpful but counter-productive, as the problem could not be addressed by other steps the Department could take.

Although an apology was given to the requester and administrative steps were taken to prevent a reoccurrence of the problem, a realistic estimate of time for collation and disclosure should have been given at the outset. To mislead a requester in such circumstances is clearly unreasonable. The consequences for any requester who has relied in good faith on an undertaking to release information by a specified date can be serious, particularly if the information is necessary to enable early resolution of matters with a third party.

Sir Brian Elwood — *Chief Ombudsman*
Anand Satyanand — *Ombudsman*

Publicly available information

When a request for official information is refused under s18(d) of the Official Information Act, on the ground that the information is publicly available, it is reasonable for the Minister, Department or organisation also to advise the requester where and how the information may be obtained.

A complaint was received against a Cabinet Minister's decision to refuse to provide copies of transcripts held of radio and television news coverage of certain proposed legislation. The requester claimed that the transcripts were not publicly available.

He said he had been required to provide dates and times of broadcast before they would be released to him by the broadcaster, and been told that if no requests for transcripts had been received within a certain time, then the tapes were erased and used for re-recording.

The Minister accepted that although the items requested had originally been in the public domain, this did not necessarily mean that transcripts of news items remained available at the time of a subsequent request for them under the OIA, and accordingly released copies of the transcripts held by him.

Mail to Prisons

Prison inmates can communicate with the Ombudsmen in private, without their mail being subject to the usual security checks.

It is contrary to both s.16(2) of the Ombudsmen Act 1975 and r.103 of the Penal Institutions Regulations 2000 for prison authorities to open incoming mail addressed to inmates from Ombudsmen or outgoing mail from inmates addressed to the Ombudsmen.

An inmate complained that he had received a letter from the Chief Ombudsman which had already been opened by prison authorities. An investigation established that this did occur, although it was not possible to pinpoint exactly when or by whom the letter was opened.

The complaint was upheld and the regional manager of the prison wrote to the inmate apologising for the incident, drawing the attention of his staff to the importance observing the relevant regulation, which enables inmates to have contact with an independent authority in private.

POLICE AND THE OIA

Information contained in some Police documents may be withheld irrespective of public interest considerations favouring the availability of some of the contents.

In reviewing a complaint about a failure to provide the details of a Police operational plan produced in anticipation of specific protest action, the Ombudsman formed the view that S61A of the Police Act 1968 appeared to apply to the document containing the information.

That section declares the Police Gazette and every other Police Notice, Circular or other document of "like nature" to be confidential documents which shall not be disclosed under the Official Information Act (OIA) or otherwise without written permission from the Police Commissioner.

This applies to documents and publications which:

> **"contain information the disclosure of which would be likely to prejudice the maintenance of the law;**
>
> **are published by a member of the Police;**
>
> **and are intended to be circulated only to the Police".**

The section is designed to ensure that internal Police documentation is kept confidential if it contains information which could impair the Police in the performance of their duty if it were made public.

Where the section applies to a document, confidentiality applies to its entirety, irrespective of whether it would be possible to extract some information from it which might not have any prejudicial effect

2000/2001 ANNUAL REPORT NOW AVAILABLE

The Annual Report of the Ombudsmen for the year to June 30, 2001, is now available and can be downloaded from the website: www.ombudsmen.govt.nz.

Readers are reminded that they can also download copies of the Ombudsmen's Practice Guidelines from the web.

Name of "Ombudsman"

Changes have been made to the published description of the process used by the Chief Ombudsman to giving consideration to any request for consent to use the name "Ombudsman".

S28A(1) of the Ombudsmen Act 1975 provides that:

> *"no person other than an Ombudsman appointed under this Act may use the name 'Ombudsman' in connection with any business, trade or occupation or the provision of any service, whether for payment or otherwise, or hold himself, herself or itself out to be an Ombudsman except pursuant to an Act or with the prior written consent of the Chief Ombudsman".*

From time to time, the Chief Ombudsman is asked to give his consent under this section. New guidelines have been issued to explain how requests for consent are to be considered in the future.

The term "Ombudsman," as used in the Act, applies to an office-holder who is a clearly recognisable part of the constitutional checks and balances that protect the public against excesses by Government processes, and thereby enhances the accountability of those processes. It is in the public interest that this role not be confused by seeking to use the name "Ombudsman" with a consumer-complaint resolution system.

Experience with non-statutory Ombudsmen has shown that confusion can arise in the minds of the public about the role of an Ombudsman under the Ombudsmen Act when the term "Ombudsman" is used outside that context.

The several conditions that apply to all consents include, for example - that the name "Ombudsman" must not be used alone but only as part of a descriptive title that makes the role clear. The overriding consideration will be whether the public interest will be served by the creation of another organisation using the name "Ombudsman" as part of its title.

RELIGIOUS BELIEFS

Sincerely held religious beliefs may not be sufficient reason to avoid compliance with the requirements of legislation.

The Ombudsman considered a complaint under the Ombudsmen Act from a man who the Land Transport Safety Authority had refused a driver's licence because he would not keep his eyes open when his photo was being taken.

The complainant quoted the Bible as his authority for his refusal.

"It is written in the Bible that the eyes are the windows to the soul," he said. "It is my right to close my eyes; it is discrimination against God".

S12 of the Land Transport (Driver Licensing) Rule 1999 requires that an applicant for a driver's licence must allow a photograph to be taken and that the image must be "a good likeness." The Ombudsman held that to require the photograph to be taken with the eyes open was consistent with this section.

W h i s t l e b l o w i n g

All public sector organisations should by now have internal procedures for receiving and dealing with complaints of "*serious wrongdoing*", as defined by the Protected Disclosures Act (known popularly as the "*whistleblower legislation*").

Information on those procedures should be readily available to anyone within the extended definition of "*employee*".

The Act is designed to assist any person wishing to make disclosure of serious wrongdoing in or by their employer and came into force on January 1, 2001.

Yet little use appears to have been made of it, so far, in spite of publicity in professional publications, particularly those dealing with employment law.

The two Ombudsmen are specifically empowered by the Act but had, as at August 31, not been called upon to make a single formal investigation. Their powers are constrained, however, by the Ombudsmen Act and do not extend beyond the public sector.

The Ombudsmen's two main roles under the Act are:

> *"supplying information to and guiding anyone in the public or private sector who wishes to consider making a disclosure as to serious wrongdoing; and*
>
> *acting as an "appropriate authority" to whom complaints can be made"*.

The Ombudsmen have appointed senior staff at Auckland, Wellington and Christchurch to take primary responsibility for such work. At each of those offices, copies of the Ombudsmen's pamphlet "*Whistleblowing*" and booklet "*Protected Disclosures Act Notes"* are available on request.

These senior staff hold formal appointments to perform an Ombudsman's functions under the Act.

CLARIFY REQUEST

Requesters who have difficulty in accessing the information they seek need to specify their request clearly. This was illustrated in two recent complaints to the Ombudsmen.

In one, a landlord had sought information from New Zealand Post about a mail redirection order against his previous tenants. He already knew the new address of the tenants, as he indicated in his request, and just wanted to confirm the existence of their mail redirection order.

NZ Post at first refused to confirm or deny the existence of the order, on the grounds that to do so would be a breach of privacy. Once the requester had clarified that he did not want the address, because he already had it, NZ Post confirmed the former tenants had such an order, so providing evidence that they had received Court documents they had denied receiving. Confirmation of the order was all the requester wanted.

Another request, to a Minister, had at first been understood as a request for a vast amount of information, and declined on that basis. In fact, on close analysis, the request had been very specific. The request had actually been for information that did not yet exist – in itself a good reason for refusing the request.

Careful initial reading of the original request can save a lot of time and effort.

Security or punishment

Any increase in the level of security of a prison inmate must not be tantamount to an increase in their level of punishment.

A long-term inmate complained to the Ombudsman that his security classification had been raised to *"maximum"* and that he had been placed in near punishment conditions without there being any misconduct to warrant such a move.

The Department of Corrections said its move had been in response to information suggesting the inmate's safety was in jeopardy as a result of the gang-related offence for which he had been sentenced. The prison's justification was that the only area in which the inmate could be placed safely was its maximum security block and, because he was to be put there, his security classification should be "*maximum*".

The inmate himself had not sought protection of any kind. He did not consider it was reasonable for him to be placed on what is called "*administrative segregation"*.

The Department agreed to the Ombudsman's suggestion that it review the inmate's security classification. As a result, this was lowered and he was found another location appropriate to his circumstances.