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Editorial

Requests for Draft Documents

In recent years, there has been an increasing tendency for requesters, when seeking access to copies of documents such as reports, correspondence or policy advice, also to request copies of any *"draft reports, correspondence or advice."* We are often asked if there is any special protection under the Official Information Act (OIA) that allows any requests for such drafts to be refused.

The short answer is: *"Draft"* documents are official information and can properly be the subject of requests under the OIA. The Act does not protect draft documents as a special exempt *"class"* or *"category"* of information. Each case must be examined on its merits.

However, on the basis of our experience in reviews under the OIA, there is often good reason under the Act to refuse requests for draft documents. The difficulty in trying to apply any general rule on when drafts should or should not be disclosed is that a request for *"draft reports, correspondence or advice"* can cover a wide array of different circumstances. For example, there is a significant distinction between requests for:-

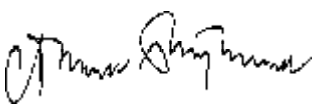
- Early drafts prepared by the author of a particular document for their own use as part of the process of jotting down initial ideas and working through them, to develop the final shape and content of the advice or information the author wants to convey;
- Documents which are drafted for the signature of another person where that person may wish to (and must be free to) amend or even decline to sign; and
- Documents which are the end product of a deliberative drafting process and are labelled *"Draft"* and then circulated to third parties for comment before being finalised and tendered to the planned recipient of the document (be it a specific individual, an interest group or the general public as a whole).

In each case the fundamental questions to be addressed are - whether disclosure of the draft documents requested would prejudice an interest protected under the Act, and whether there is a countervailing public interest in disclosure that outweighs the interest in withholding? Factors to be considered will include the nature and content of the draft document, the context in which it was generated, the process to which it relates and how it is to be used, and the extent to which the information it contains is already in the public domain.

Often *"draft"* documents can be released without any detrimental impact on effective government or administration at all. However, if the end result of disclosure of drafts is to prejudice the quality of the reports or correspondence or advice being generated, then the wider public interest of effective government and administration would not be served.

In assessing whether there is any countervailing public interest in disclosure of draft documents, it must be remembered that decision-makers are accountable for the advice they act upon and not for early drafts generated in preparation of that advice they will often not have seen. Usually, it would only be in circumstances where disclosure of drafts would reveal some impropriety in process or practice that the public interest in release would outweigh valid interests in protecting information under the Act. That is an assessment that can only be made in the circumstances of each particular case.

Sir Brian Elwood
Chief Ombudsman



Anand Satyanand
Ombudsman

Third Ombudsman Appointed

Mr Mel Smith, a former Secretary of Justice, has been appointed as an Ombudsman, making the total Ombudsmen complement now three.

Born in Hawera, Melwyn Purefoy Smith holds a BA from Victoria University with a double major in Political Science, Public Administration and Criminology. He also graduated from the Senior Executive Management Programme at Henley College and the Strategic Management Programme at Templeton College, both at Oxford University.

Most of Mr Smith's working life was spent in the Department of Justice in a variety of roles, including Chief Inspector and later Secretary of Justice in 1995 when the Department was being restructured. He also spent four years as Deputy Secretary of Internal Affairs. From 1996-2001 he was a self-employed consultant specialising in public service projects.

He has had a long private involvement in Maori affairs and was the founding Chairman and is current Patron of Arts Access Aotearoa. This organisation works to involve elderly people, refugees, disabled people and the prison population in the arts.

Mr Smith's hobbies focus mainly on sport (he played cricket at first class level) and music (he describes his musical interests as "eclectic").

Tertiary Education Investigation Officer

The Office of the Ombudsmen has its first investigating officer for tertiary education matters – Mr **Garry O'Donovan,** MSc (Chem) University of Auckland.

He previously spent 30 years at the Central Institute of Technology in a variety of roles. He began as a tutor at the School of Pharmacy but for many years was the Institute's Deputy Principal. He also spent two years as Academic Manager of Tai Poutini Polytechnic at Greymouth.

Mr O'Donovan will assist the Ombudsmen investigate complaints about administration matters in New Zealand tertiary education institutions.

President of IOI

The Chief Ombudsman, Sir Brian Elwood, was recently re-elected President of the International Ombudsman Institute (IOI) for a third term at the IOI's annual meeting in Seoul, Korea. Terms of office are for one year.

Budget Secrecy and the OIA

While the process of preparing the Budget has traditionally been undertaken away from the public eye, this does not mean that all information generated as part of the Budget process may be withheld.

The convention of *"Budget secrecy"* within the context of the Official Information Act (OIA) still requires an assessment of whether disclosure of the specific information requested would prejudice the effective preparation of the Budget and of any countervailing public interest considerations favouring disclosure. In general terms, the constitutional convention surrounding Budget secrecy has tended to protect from disclosure much of the information relevant to the preparation of the next Budget to be presented to Parliament on behalf of the Government.

However, in practice, once decisions have been made and announced as part of a particular Budget, information about these decisions normally does not require protection under the OIA. The advent of coalition governments has resulted in Government expenditure being managed over a three-year cycle rather than on an annual basis.

This has required some modification of the approach to the convention of Budget secrecy under the OIA, in that the need to protect some information may extend longer than the announcement of the next Budget. The present Government, like its predecessor, operates a three-year Budget cycle.

Therefore, in assessing whether there is a need under the OIA to withhold information relating to the Budget process, the nature of the information, the context in which it was generated and the timing of the three-year Budget cycles to which it relates, must all be taken into account. Once a Budget proposal has been dealt with, which may include it being abandoned, information relating to that proposal will normally only be able to be withheld if its release would prejudice proper consideration of other proposals on which decisions are yet to be made. Even then, countervailing public interest considerations may require at least some degree of disclosure.

Disputes Tribunals Not Subject

The Ombudsmen do not have jurisdiction over the Disputes Tribunal or Disputes Tribunal Referees. The latter are not named in the Ombudsmen Act 1975.

A complainant asked how an Ombudsman could decline to investigate a policy decision by Disputes Tribunal Referees over which cases they would deal. It was argued that, as the Department of Courts administered Tribunals and Tribunals were part of the Department, so the Referees were subject to the Act.

That is not the case. S13(1) of the Act describes an Ombudsman's function under the Act, in essence, being to investigate the administrative acts, decisions or omissions of *"Departments or organisations named or specified in … this Act"* and includes those of any *"officer, employee or member of such Department or organisation in his capacity as such officer, employee or member."*

S4 of the Disputes Tribunals Act 1988 provides for the establishment of Disputes Tribunals and declares each of them to be a division of a District Court. A District Court is a Court, not a Government Department.

The fact that the Department of Courts has the function of administering Courts and Tribunals does not make those bodies part of the Department. They are constitutionally separate entities, and anyone appointed to preside over Court proceedings is not thereby *"an officer, employee or member"* of any Government Department.

Right to Information Not Absolute

The right to official information is not absolute but is subject to the provisions of any specific enactment which may say otherwise.

The grandmother of a four-year-old, the subject of a Family Court custody hearing, requested from the Child Youth and Family Services a copy of an affidavit made by a social worker in connection with a case from CYFS.

CYFS withheld the affidavit pursuant to a provision of the Children Young Persons and Their Families Act 1989. S18(c) of the Official Information Act (OIA) provides for circumstances where making information available would be *"contrary to the provisions of a specific enactment"* or *"constitute a contempt of court"*.

This resulted in the grandmother approaching the Ombudsman because of her interest in her grandchild's custody hearing.

S438 of the 1989 Act was considered. It provides that *"no person shall publish any report of proceedings under this Act except with the leave of the Court that heard the proceedings"*.

In the Ombudsman's opinion, this precluded the release of the affidavit under the OIA. It was, however, suggested that the grandmother could make an application to the Court to view the document.

INTENDED LEGISLATIVE PROGRAMME ABLE TO BE WITHHELD UNDER OIA

If the Government's intended but not final legislative programme were released prematurely then the quality of the information it contained would likely be reduced. That would impair the orderly and effective conduct of Government business. A case had been brought to the Ombudsmen seeking access to the intended legislative programme, following refusal.

A complaint was made that the information in the intended programme had been withheld improperly under s9(2)(f)(iv) of the Official Information Act (OIA), the section protecting confidentiality of advice tendered by Ministers and officials.

Traditionally, circulation of the programme has been restricted to Ministers and, on a strictly need-to-know basis, certain officials. Additionally, the contents are subject to frequent alteration before the actual programme is settled.

Ministers make decisions on the programme at various times during the year. For example, policy work on proposed legislation may not have been finalised, or it may still be subject to negotiation with other parties in Parliament or with outside groups, yet be identified in an intended programme.

The Chief Ombudsman considered that while there was a public interest in disclosure of information that showed the workings of government, to promote accountability and participation, this did not outweigh the public interest in ensuring that releasing information did not undermine the ability of government to function effectively.

It was observed that substantive decisions of Cabinet on legislation to be actually introduced were made public by numerous means. There were also long-standing and well-established arrangements for public participation in the legislative process.

Potentially Contaminated Site Information

Information held by regional councils about potentially contaminated sites should be in the hands of the relevant district council.

A regional council received a request from a newspaper for a list of all potentially contaminated sites in a particular district council's area. Some of the information was released but the regional council withheld the location of sites that had in the past been used for purposes that could have contaminated the land – under s7(2)(a) of the Local Government Official Information and Meetings Act, to protect the privacy of the current owners. The regional council believed there was no public interest served by releasing the information.

Enquiries by the Chief Ombudsman showed that no work had actually been done to establish whether or not the sites posed a risk.

Information about the possibility that the properties might be contaminated had not been provided to the relevant district council and, while the regional council held the information, it had not advised the current owners that it had information that their properties might be contaminated.

A public interest was identified in releasing the information to the territorial authority and to the owners but, given the nature of the information, the owners and occupiers had privacy interests to be protected.

A resolution was found satisfactory to the complainant. The regional council agreed to advise the district council and the land owners about the information it held on such sites.