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Editorial

Official Information Act Practice Guidelines

The Official Information Act has now been in operation for 19 years. The general principles are well established. However, with staff turnovers and loss of institutional memory, many agencies have difficulty in ensuring consistent applications of those principles to the circumstances of individual cases.

Given our role as the statutory review body, it is not surprising that many users of the official information legislation look to the Ombudsmen's general approach as a guide. Since 1994, we have issued periodically Practice Guidelines, setting out our general approach to issues arising under the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987.

Over the past 12 months, we have reviewed the Practice Guidelines currently in circulation with a view to:

(a) Updating and consolidating the existing Guidelines;

(b) Identifying issues that arise regularly and which are not covered in the existing Guidelines;

(c) Explaining the process under the official information legislation for making requests for access, and obligations on both requesters and public sector agencies and Ministers considering requests; and

(d) Explaining the process for seeking an Ombudsman's investigation and a review of decisions with which requesters are dissatisfied.

As a result of our review, we have published a new comprehensive document in a revised format which we believe will provide greater guidance to users of the official information legislation about the general approach of the Ombudsmen in carrying out our investigation and review function. The new Practice Guidelines also explain the process under the official information legislation for making requests for access to information and the process for seeking an Ombudsman's investigation and review of decisions with which requesters are dissatisfied.

The Guidelines can be downloaded free of charge from our website – http://www.ombudsmen.govt.nz. However, paper copies of our Guidelines can be ordered from our office for those who cannot easily access the Guidelines in electronic form.

A copy of the table of contents of the new Guidelines is incorporated in this publication, together with information on how to order paper copies.

While each request for official information must be considered on its merits, we hope that the new Practice Guidelines will assist holders to identify relevant issues and obligations at an early stage.

Draft Answers to Parliamentary Questions

In two recent cases, the Chief Ombudsman considered that draft answers to Parliamentary questions could be withheld under the Official Information Act (OIA).

The question arose in two contexts:-

(a) A request made to a department which had prepared a draft answer for the Minister's consideration; and

(b) A request made to a crown entity which had prepared a draft answer for the Minister's consideration.

In the first case, s9(2)(f)(iv) of the OIA was found to apply. This was because Ministers must be free to make their own decisions as to the most appropriate manner in which to answer a question. They are then accountable to Parliament for the response actually given.

Any advice tendered by officials to assist Ministers prepare answers to Parliamentary questions is advice tendered in confidence. Releasing draft answers would undermine the ability of Ministers to determine the manner in which questions should be answered.

If draft answers were released, it was considered that Ministers would be less likely to seek the advice of their departments in the future, which would diminish the quality of information provided to the House.

For these reasons, draft answers from departments will usually be protected by s9(2)(f)(iv).

In the second case, an issue arose as to whether employees of a crown entity are "officials." S9(2)(f)(iv) applies only to advice tendered by "Ministers of the Crown and officials."

As s9(2)(ba)(ii) of the OIA was seen to be applicable to crown entities, it was not necessary to determine whether s9(2)(f)(iv) applied. S9(2)(ba)(ii) applied to draft answers as they were clearly subject to an obligation of confidence and their release would "clearly damage the public interest" for the reasons applicable to the consideration of the first case.

In all cases involving these issues, it is necessary also to consider whether the content of the draft answer or surrounding context raises any countervailing public interest considerations which outweigh the need to withhold.

ANONYMITY OF PUBLIC OFFICIALS

Public officials' names should, in principle, be available when requested under the Official Information Act (OIA). Anonymity of public employees and statutory appointees should be reserved for special circumstances – such as where the safety of individuals is at issue.

But some holders of official information seek to withhold the names of relevant officials, other than at chief executive level, from documents released under the OIA.

The first test for the release of personal information is s9(2)(a):"…the withholding of the information is necessary to protect the privacy of natural persons."

The information released would normally only disclose the fact of an individual's employment in the public sector, and perhaps what they are doing as part of their employment.

Beyond that point, the Ombudsmen generally accept that considerations of personal privacy will always be likely to apply to an official's home contact details or information of a personal nature.

While such details may be of interest to the public, there is only a limited "public interest" in disclosing (for example) a direct-dial inwards telephone number or email address if the other contact details provided are adequate.

If the real concern is that it is necessary to withhold officials' names to maintain the effective conduct of public affairs through the "free and frank expression of opinion by officials" under s9(2)(g)(i) of the OIA, then consideration can be given to the nature of the information with which the name is linked and that individual's seniority.

There may also be special circumstances where withholding is justified under s9(2)(g)(ii) to protect officials from harassment.

When there are approaches to officials from the news media, the Ombudsmen assume that responsibility for managing such contacts lies at a senior level of the public sector agency and the official's name is rarely able to be withheld.

Dog Registration

An attack on a woman by a ferocious dog might have been avoided if a local authority had followed reasonable administrative procedures after earlier attacks by the same dog.

This particular dog that had already attacked other people living in nearby areas. It was eventually destroyed.

But the woman complained that the dog could have been impounded earlier and that if the council of the area in which she was attacked had followed reasonable procedures she would not have been attacked.

The Chief Ombudsman recommended that the council reconsider the structure of its dog registration database to improve the quality of the information available about animals on it, including where the dog concerned was known to be registered with another council. The council agreed to do so.

He also recommended that councils conduct regular reviews of their guidelines to staff for when any dog is seized, as dogs can move between the jurisdictional areas of different councils.

Revoking Student Permits

The New Zealand Immigration Service (NZIS) has, in a positive response to a complaint, agreed to reword its notices revoking student permits to indicate that someone whose permit has been revoked may, in certain circumstances, make submissions to the NZIS as to why this should not occur.

A foreign student had his student permit revoked following his expulsion from a language academy, and complained to the Ombudsman.

As his permit was to enable him to study at the specific language academy that had expelled him, the revocation decision was considered reasonable. If there was concern about the accuracy or fairness of the information supplied by the language academy to the NZIS then that could have been the basis of further action.

The Ombudsman suggested that this avenue be made clear by the NZIS in its documentation, and the NZIS agreed.

Parole Board Privacy

Individuals who want their involvement with the Parole Board kept confidential need to say so.

A complaint was made by a person concerned that written submissions to the Parole Board might lead to their identification by the offender to whom the submissions referred.

In completing the investigation of the complaint, the Chief Ombudsman suggested that someone making such a submission should be advised that they can ask for personal details, such as their name and address, to be withheld from the offender to protect their privacy. Such advice should be incorporated into the relevant procedures manual.

Prisons must honour undertakings

Where a prison has given an undertaking to an inmate that if certain standards are met then certain actions will follow, that undertaking must be honoured.

A long-term inmate complained to the Ombudsmen that his maximum security classification was unreasonable.

Various incidents had occurred previously that justified this classification. But over the period of a year he had been given assurances by prison management that, should he remain incident-free for a period of six months, his security classification would be lowered. He did remain incident-free for this period but his classification remained at maximum.

In the circumstances, the failure to honour the undertaking was unreasonable. The Department of Corrections agreed to lower the inmate's security rating.

No right to "undisturbed consideration" of advice

In a number of recent cases, it has been asserted that the withholding of information is justified under s9(2)(f)(iv) of the Official Information Act on the basis that Ministers are entitled to "undisturbed consideration" of advice.

That is not correct. While in an individual case it may be necessary to withhold information so Ministers and/or Cabinet may properly consider it, there is no general "right" to undisturbed consideration.

The Ombudsmen have accepted that one of the situations in which s9(2)(f)(iv) of the OIA will apply is where release of information will undermine the ability of Ministers and/or Cabinet to properly consider advice that has been tendered. Whether that is so must be considered on a case by case basis.

In some cases the release of advice may undermine the decision-making process. However, there must be an explanation as to why disclosure will have this effect. If disclosure will not have this effect, then it is not "necessary" in terms of s9(2)(f)(iv) to withhold.

Even if releasing the information will prejudice the decision-making process, organisations must still consider whether there are any countervailing public interest considerations which favour release of the information.

Where advice has been considered by Ministers and Cabinet, there can be a public interest in releasing sufficient information relating to that advice - to promote public participation in the policy-making process.

Whether this public interest outweighs the need to withhold information is an assessment to be made based on the circumstances of the specific case.

Official Information Released - Case Closed?

When all official information requested has been released, there is little point in investigating or continuing to investigate any delay in its release, and that is generally the end of the matter – but not always.

Unlike a Court, an Ombudsman forms an opinion and does not declare the law. Thus, every complaint must be considered on its merits and the outcome of an investigation does not set a precedent. Because the requested information was finally made available there would normally be no other remedy for the requester, despite a preference to have had it sooner.

However, if holders of the official information at issue are also subject to the Ombudsmen Act – and not all of them are – then an Ombudsman may consider whether the delayed release was *"unreasonable"* in terms of s22 of the Ombudsmen Act. If it was, then under that section recommendations designed to prevent future delays can be made to the holder. Such delays would need to be more than isolated occurrences.

Rates levied on property, not on people

A ratepayer denied the use of his local authority's library because of repeated unacceptable behaviour was not entitled to a partial rebate on the rates he paid on a property occupied by him.

He had made several written requests to his district council for reimbursement of part of the rates paid for the relevant period and, when these were refused, complained to the Ombudsman.

S121 of the Rating Powers Act provides that *"The occupier of any rateable property shall be liable for all rates becoming due and payable while …name appears in the rate records as the occupier of the property."*

Because rates are levied on property and not on ratepayers as such, preventing the ratepayer from entering the library did not affect his legal liability as an "occupier" of the property for payment of the rates concerned. The complaint was not upheld.