

Editorial

Conditions on use of Official Information

In many cases, where Ministers or departments or organisations refuse requests for official information, a concern is not so much disclosure to the requester but the future use to which they believe the information might be put.

There is often a mistaken view that the Official Information Act (OIA) does not allow an agency holding official information to impose conditions on the use of official information made available under the OIA. Put simply, many agencies believe that once official information is made available under the OIA then there is no restriction on how the requester can choose to use it.

However, s28(1)(c) of the OIA identifies that one of the functions of the Ombudsmen is “*to investigate and review any decisions by which a department or Minister of the Crown or organisation imposes conditions on the use, communication or publication of information made available pursuant to a request made in accordance with s12*”.

This provision recognises implicitly that in certain situations it may be reasonable to refuse to make available certain information unless the requester agrees to specific conditions on the “*use, communication or publication*” of that information. Equally, it recognises that in certain situations concerns about the outcome of disclosing official information may be met by imposing conditions on how the information is used.

A common example is where researchers are granted access to official information on conditions that they cannot communicate or publish any of that information to third parties without the express permission of the agency holding that information.

Whether it is reasonable to impose conditions on the use of official information depends on the circumstances of each case, but there are two main considerations:-

- * It must be established that there is good reason under the OIA to refuse the request if there were no conditions imposed. The imposition of conditions cannot be utilised as a means of restricting access to information where no good reason for refusal otherwise applies; and
- * the department or Minister or organisation concerned is entitled to query whether it is practicable to impose conditions and whether there is sufficient assurance that they will be honoured or can otherwise be enforced. Even though the OIA does not require requesters to state the purpose for which they are seeking the information, it may be to their advantage to clarify their purpose so that the option of release subject to conditions can properly be considered.

In our experience, the option of making information available subject to conditions on its use is often overlooked in cases where it may have resolved concerns about wider disclosure.

Sir Brian Elwood
Chief Ombudsman

Anand Satyanand
Ombudsman

Mel Smith
Ombudsman

Sir Brian Elwood is to retire



Sir Brian Elwood is retiring as Chief Ombudsman in April, after a career spanning 35 years of public service. He was appointed as an Ombudsman in 1992 and Chief Ombudsman in 1994.

A barrister and solicitor in private practice, Sir Brian was first elected to the Palmerston North City Council in 1968 and became the city's mayor, serving from 1971-1985.

He has served on many public bodies including as chairman of the Manawatu United Council, a member of the Wellington Harbour Board, Commissioner for the Wellington Area Health Board and a member of the Massey University Council.

Sir Brian was an executive member of the Municipal Association of New Zealand from 1974-85 and its president from 1976-79.

He moved to the capital in 1985 on being appointed chairman of the Local Government Commission, responsible for the major reform of local government in 1989. He received international recognition for his achievements in local government administration and reform.

Sir Brian was elected President of the International Ombudsmen Institute, the professional body of Ombudsmen around the world, a post he held from 1999 to 2002. In 1994 he became a director of the Institute, representing the Australasian and Pacific Ombudsmen.

Sir Brian received the Queen's award of Knight Bachelor in 1990 for services to local government and New Zealand and an Honorary D.Litt. from Massey University in 1993.

Prejudice to the maintenance of the law

If information held by the Police "*would be likely to ... prejudice the maintenance of the law*", under s6(c) of the Official Information Act (OIA), there exists "*good reason*" for the Police to withhold it.

An approach was made to the Ombudsman for access to Police information from an investigation into alleged threats made against a judge.

The Ombudsmen consider the identity of an informant as "*personal information*" to the person who is the subject matter of the information and therefore a matter to be investigated by the Privacy Commissioner. Information about other people is "*official information*" and thus a matter to be investigated by an Ombudsman.

In this case, the information related to the requester and members of the requester's family. Thus it was a mixture of "*official information*" and "*personal information*" requiring investigation by both the Privacy Commissioner and the Ombudsman.

Successive Ombudsmen have accepted that statutory law enforcement agencies rely heavily on the public for assistance, and that much of this information is supplied on a confidential basis.

In this case, the Privacy Commissioner and the Ombudsman agreed that releasing the information would be likely to reveal the identity of the informant, jeopardising the continued supply of information from the public and thereby prejudicing the maintenance of the law.

A question of existence – to neither confirm nor deny

Sometimes wanting to know about just the existence of information can bring a “*neither confirm nor deny*” response under s10 of the Official Information Act (OIA).

Such a response is appropriate if public knowledge about the existence or non-existence of information would be likely to lead to a specific harm or prejudice that other particular provisions of the OIA – s6, s7 and s9(2)(b) – are intended to protect.

The Overseas Investment Commission (OIC) was asked for information on whether it had received from overseas interests any applications for consent to acquire some specified property. The request was refused under s10 because release of the requested information would be likely unreasonably to prejudice the commercial position of the party(ies) who might have supplied the information or be the subject of the information – s9(2)(b)(ii).

The OIC explained that information about either the existence or non-existence of an application under the Overseas Investment Act 1973 was commercially valuable and needed to be protected until such time (if ever) that OIC received and decided upon an application.

This was because if, in response to an initial enquiry, the answer were given that no application had been received, any subsequent “*neither confirm nor deny*” response – in the event that an application had since been received – would nevertheless be a strong indicator that such an application then existed. Protection of this information would then be lost.

Application for consent under the Overseas Investment Act can be received by the OIC in advance of the market or even of the vendor being aware of the applicant’s interest in the asset.

Knowledge by any interested party about either the presence or absence of a (or another) potential purchaser of an asset is an important market indicator that can affect its sale price. Depending on circumstances, such information might therefore prejudice the commercial position of either the prospective vendor or potential purchaser.

In this particular case, the Chief Ombudsman accepted that the interest protected by s9(2)(b)(ii) would be likely to be prejudiced by disclosure of information about the existence or non-existence of any consent application and that s10 therefore applied.

If s10 is to be applied properly it is only necessary to be satisfied that there is an interest to be protected by virtue of s6, s7 or s9(2)(b). There is no requirement to consider whether there is a countervailing public interest in disclosure that outweighs the reasons for withholding.

Electricity Complaints Commissioner

The jurisdictions of the Ombudsmen and the Electricity Complaints Commissioner overlap on complaints about the three State-Owned Enterprises (Genesis Power Limited, Meridian Energy Limited and Mighty River Power Limited) and their related companies (currently, Mercury Energy and First Electric).

The function of the Electricity Complaints Commissioner is to resolve complaints by consumers about the provision of energy.

It has been agreed with the Commissioner that where the Ombudsmen receive a complaint about matters within the normal functions of the Commissioner about any such entity, the complainant will be advised of the Commissioner’s powers and that the Commissioner should be their first point of reference.

If this does not resolve the matter, then the complainant retains the right to approach the Ombudsmen, and the Commissioner will advise a dissatisfied complainant of their right to complain to an Ombudsman.

Jurisdiction over private prisons

Privately-managed prisons are within the responsibility of the Ombudsmen, although they do not usually have jurisdiction over matters involving private companies.

Complaints are received periodically from inmates at the Auckland Central Remand Prison which is the country’s first privately-managed prison, run by Australasian Correctional Management Ltd.

Section 41C(1) of the Penal Institutions Act allows for this: “For the purposes of the Ombudsmen Act 1975 and the Official Information Act 1981, every contract penal institution shall be deemed to be part of the Department of Justice.”

Ombudsmen investigating staff make regular visits to this prison as they do to those prisons run by the Public Prisons Service.

A legal person's right to personal information

A legal person – a body corporate – has a qualified right of access to personal information about itself under Part IV of the Official Information Act (OIA) - s24 - in much the same way as a natural person has this right under the Privacy Act.

Accordingly, a legal person has the right to request a correction of its personal information if it considers that this is inaccurate or incomplete, and gives a misleading impression – s26.

Section 35 of the OIA authorises an Ombudsman to investigate a decision made under Part IV of the OIA, including a refusal of personal information (s27), or a failure by the information holder either to correct that information or at least to note it with the nature of any correction requested but not made.

However, s35 provides that such an investigation is to be conducted under the Ombudsmen Act 1975 (rather than under the OIA). This means that if the Ombudsman comes to a view in favour of the complainant, no public duty to observe any recommendation made will arise as happens with a formal recommendation made under the OIA.

A recent complaint involved a company whose day-to-day dealings with a government department had been impaired significantly because the department had received adverse allegations about the company. The department had released to the company the nature of these allegations but refused to reveal the identity of the person making them.

In the event, the Ombudsman upheld the department's decision to refuse to reveal the identity of the informant on the grounds that disclosure would be likely to prejudice the maintenance of the law; and if the department could not protect its sources, then in similar circumstances information on possible offences would be likely to dry up.

Use of “Released under the OIA” stamp

On occasion, holders of official information provide documents to a requester photocopied onto paper that has been pre-printed with the stamp “*Released Under The Official Information Act*” to indicate that the release of the information was intended, and was not an unauthorised leak.

Where an Ombudsman conducts an investigation into a complaint of withholding official information, the Ombudsman will require a copy of the information at issue. A recent trend has been for documentation to be provided with each page marked with the stamp.

The use of the stamp in these circumstances is liable to mislead. The information will have been provided to the Ombudsman pursuant to s19 the Ombudsmen Act.

However, it might appear as if such documentation has been released following a request under the OIA, whereas it has only been released in confidence to the Ombudsman. This confusion may result in the information being disclosed subsequently by mistake by the information holder's staff in response to further requests for the same information.

The Ombudsmen suggest that the use of the stamp be restricted to papers which have been released formally to a requester under the OIA.

A further problem can be that holders sometimes use a form of block stamp on released official information which obscures the text on the page. The use of the stamp must never be such as to affect the legibility of the document.