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Editorial

An Ombudsman's provisional view

When Ombudsmen investigate complaints under the Ombudsmen Act, the Official Information Act and the Local Government Official Information and Meetings Act, their aim is to form an independent opinion on the merits of the particular complaints.

An integral part of the process is to invite any party who may be affected adversely by an Ombudsman's report or recommendation to comment on a *"provisional view"* before any final view is formed.

Such *"provisional views"* set out the relevant facts (as the Ombudsmen understand them at the time) and preliminary opinions based on those facts. Comments received can range from acceptance of the provisional view to disagreement with an Ombudsman's understanding of the relevant facts or preliminary opinions based on them. Sometimes, parties who are given an opportunity to be heard decline to comment at all.

Essentially, an Ombudsman's *"provisional view"* is a preliminary opinion formed on the basis of an Ombudsman's understanding of the circumstances at that time and subject to the proviso that there may be further information or clarification that needs to be considered before any final opinion or recommendations are formed.

However, it has become apparent that, from time to time, some parties, including public sector agencies, mistakenly regard an Ombudsman's *"provisional view"* as effectively a final opinion.

This misplaced perception can occasionally cause officials to decline to comment on an Ombudsman's *"provisional view,"* even though they disagree with it or believe that not all relevant factors have been brought to an Ombudsman's attention.

It is important that any party that is consulted on an Ombudsman's *"provisional view"* fully understands that no final opinion has yet been formed and that an Ombudsman's mind will be open to further comments or submissions.

However, in the absence of any comment on a *"provisional view"*, it is likely that an Ombudsman will adopt a *"provisional view"* as the final view in an investigation.

John Belgrave is Chief Ombudsman

Mr John Belgrave, previously Chairman of the Commerce Commission, has been appointed the new Chief Ombudsman, to take office on July 1, 2003.

Mr Belgrave holds a B.Com in Economics and has worked in the public service since 1964. His early years were spent in overseas trade posts, rising to be Assistant Secretary of the Department of Trade and Industry in 1980-82.

In 1985-87 he was Comptroller (chief executive) of the Customs Department and in 1987-88 Executive Director of the Bankers' Association. From 1988-94 he was Secretary (chief executive) of the Ministry of Commerce and Director of Trade New Zealand.

Mr Belgrave was Chief Executive overseeing the changes from the Department into the Ministry of Justice in 1994-97 and a member of the Electoral Commission. In 1997-99 he was Executive Director of the Electricity Supply Association and Director of Electricity Market Co Ltd as well as, in 1998, Chairman of the Standards Council.

In 1999-2000 he was Director of the State Services Commission 2YK (Year 2000) Project Office and became Chairman of the Commerce Commission in 1999.

In recent years, Mr Belgrave has been involved directly in the development and implementation of competition policy right across the economy. He has been involved directly in economic and trade policy development and implementation here and overseas.

Badly worded communications

Too often, communications from central and local government implicitly convey a meaning the opposite of what was intended. This happens most often, but not only, in correspondence.

Recently, a council received a complaint about the three standard charges included on a rate invoice. Council staff were persuaded that in the circumstances only two charges should fairly be made.

It referred the matter to the council but incorrectly reported only on the two changes considered to be fair. There was no reference to the third charge originally made.

Inadvertently the recommendation, duly adopted by the council, was to advise the council that the *"the charges raised on the rate account"* accorded with council policy, were due, and should be paid.

Thus advised, council staff duly acted and the complainant understood that the council had reaffirmed all three charges on the original invoice.

The Ombudsman was asked to intervene and the discrepancy was observed when the Ombudsman asked for the council's explanation during the investigation. Once the council realised the discrepancy it remitted the third charge, so resolving the matter.

This case is by no means unique. It is a timely reminder of the importance of checking the facts when dealing with complaints.

Access to e-mails

Technological advances and the drive towards e-government have seen the growing use of e-mail as a primary means of communication and transfer of information between officials of departments and public sector organisations.

The speed and ease of e-mail communication seems to result in far more information being generated and retained (albeit in electronic form) than would be the case if communications were restricted only to written documents. In particular, e-mail has tended to replace telephone and direct discussions which, in the past, were not always recorded in writing.

As a consequence, many requesters are placing greater significance on seeking access to information contained in e-mails, particularly in the context of information relating to policy or decision-making processes.

On the basis of our experience in investigations and reviews, there are already some misconceptions about the application of the Official Information Act (OIA) and Local Government Official Information and Meetings Act (LGOIMA) to information contained in e-mails.

Are e-mails "official information"?

E-mails are covered by the OIA and LGOIMA. Surprisingly, some officials appear to have believed otherwise.

Information contained in e-mails clearly comes within the definition of *"official information"* in both Acts. The only issue for officials is whether the e-mails were generated or received by them in the ordinary course of their work or in a personal capacity as private individuals.

Information contained in e-mails generated or received by individuals in their official capacity as an officer or employee or member of a department or organisation is *"official information"* deemed to be held by that department or organisation.

However, as with personal telephone calls and personal correspondence received at work, personal e-mails generated or received in a private capacity are not *"official information."* In the case of Ministers of the Crown, e-mails received in their official capacity as Ministers are *"official information"*. However, e-mails generated or received as members of their political party caucuses or as private individuals are not covered by the OIA.

Retrieval of e-mails

The sheer volume of e-mail communication can mean that there are difficulties identifying and retrieving all e-mails relevant to a particular request for access to official information.

With many officials working from time to time at home or via laptop computers, the issue of whether e-mails relating to a particular matter are held may not be straightforward. In some cases, relevant e-mails have been deleted and cannot readily be retrieved.

However, both the OIA and LGOIMA allow requests to be refused in appropriate circumstances where the information is not held, or cannot be found, or is trivial, or cannot be made available without substantial collation and research. It is, however, not sufficient to simply say "*the information has been deleted*".

These administrative reasons for refusal may apply however the information is held, whether in electronic or paper form. Each case must be assessed on its merits. E-mails are NOT a special class or category of information to which different principles apply.

Obligations to retain relevant e-mails

The increasing use of e-mail as a primary means of inter-departmental communication does not absolve officials from the administrative obligation to retain adequate records of how a policy or decision-making process has advanced or why a particular outcome was reached.

One of the purposes of the OIA is to increase progressively the availability of official information to the people of New Zealand in order *"to enable their more effective participation in the making and administration of laws and policies"* and *"to promote the accountability of Ministers of the Crown and officials"* thereby enhancing *"respect for the law"* and promoting *"the good government of New Zealand"*.

If adequate information relating to the making and administration of laws and policies is not retained in accessible form, then this purpose would be undermined. As a matter of good administration, officials need to ensure that increasing use of e-mail communication does not become an excuse for failure to keep adequate records.

Failure by departments or organisations to keep adequate records is potentially a matter that could be investigated under the Ombudsmen Act on the basis that it constitutes maladministration.

Prejudice to the right to a fair trial

Official information may be withheld if making available that information would be likely to prejudice the right to a fair trial.

A news media organisation had asked the New Zealand Immigration Service (NZIS) for certain information about someone who had been granted residence in New Zealand some years earlier. This person had recently been charged with murder and was awaiting trial at the time of the request.

The request sought *"… information provided on applications for entry and/or residence to New Zealand about criminal convictions."* NZIS refused the request under s9(2)(a) of the Official Information Act (OIA) in order to protect the person's privacy.

The Ombudsman formed the view that there was good reason under s6(c) to withhold the information. S6(c) is a conclusive reason for withholding if making available that information would be likely *… to prejudice the maintenance of law, including the prevention, investigation and detection of offences and the right to a fair trial."*

In assessing whether the requirements of s6(c) are met, two important factors have to be considered:-

- First, whether release of the information "*would be likely"* to cause the predicted prejudice.
- Second, in enacting s.6, Parliament effectively identified certain circumstances where the interest in withholding would be conclusive irrespective of any considerations favouring disclosure. Unlike the reasons for withholding information in s.9, the reasons for refusal under s.6 are not subject to a requirement to take into account any countervailing considerations favouring disclosure in the public interest.

In this case, the view was formed that as a date for the trial on the murder charge had been set the only consideration was whether, at this stage, release of the information to the requester *"would be likely to prejudice … the right to a fair trial"*.

The Ombudsman was satisfied that any release of information about past criminal convictions as disclosed in the person's application for entry and/or residence, before the conclusion of the trial, would be likely to prejudice that person's right to a fair trial. But once all trial proceedings had been completed and, in the event of a guilty verdict, sentence passed, it would be open to the requester to make a fresh request.

Complaint about being unreasonable

An Ombudsman may form a view about the reasonableness of communications.

A complaint was received from the owner of residential property that a letter he had received from a local authority officer was unreasonable. The letter countermanded an earlier offer from another officer at the same level of authority to meet the complainant to discuss his concerns about the rating valuation of his property. Public officials are required to act in a manner that is reasonable, and the Ombudsmen Act gives Ombudsmen authority to review complaints when it is alleged that certain conduct is unreasonable.

After the local authority had been notified of the complaint, it acknowledged to the Ombudsman that the letter complained of was *"somewhat abrupt"* and that an apology would be offered. The council also said that its officers would meet the complainant to discuss his concerns.