

Editorial

Requests for public sector salary information

Since the enactment of the Official Information Act 1982 (OIA) and the Local Government Official Information and Meetings Act 1987 (LGOIMA), Ombudsmen have often been called upon to review decisions to refuse requests for public sector salary information. While each case is considered on its own merits, a general approach to such matters has been developed.

The dissemination of this approach through the Ombudsmen Quarterly Review and the Compendia of Case Notes has likely contributed to a relative decrease in the number of similar complaints in recent years. There also seems to have been some recent loss of institutional knowledge about the issue. This has not so far resulted in an increase in the rejection of requests but there have been more references to the Ombudsmen for advice and precedents. It seems timely to restate the approach that has been taken.

The consideration of such a request first involves the holder of the information ascertaining the weight of the privacy interest – s9(2)(a) of the OIA and s7(2)(a) of LGOIMA – and then balancing that against any public interest considerations favouring release – s9(1) of the OIA and s7(1) of LGOIMA. A similar exercise is then undertaken by an Ombudsman on review, with the proviso that Ombudsmen must consult with the Privacy Commissioner before forming a final view.

Often the natural reaction of the holder of salary information is that the privacy of the person is paramount and that the withholding of the information is necessary to protect the individual's privacy. However, significant weight must also be given to the public interest in promoting the accountability of the public sector.

The balancing of these competing interests has, in the majority of cases, resulted in outcomes that can be summarised as follows:-

- ❖ The salaries of chief executives or other heads of public sector organisations should be released, according greater weight to accountability than to privacy. Much information of this nature is, in fact, already made available publicly through the State Service Commission Annual Reports and local authority annual reports.
- ❖ Subject to consideration of the individual factors involved, salaries of second-tier management, especially where that management has responsibility for the provision of services to the public and deals with the public, should be disclosed in financial bands. This will generally meet accountability requirements while preserving a reasonable degree of privacy.
- ❖ Generally, all other salaries should remain private, according privacy interests higher weighting than accountability interests. The accountability at this level may best be achieved by the identification of the cost of a particular service provision, which is clearly an accountability issue. Again, there may be exceptions where, for instance, identification of a service cost might likely identify the salaries of those directly responsible for the service.

Investigation into Immigration Service

Ombudsman Mel Smith has begun his own investigation into the circumstances of the apparent failure of the Immigration Service of the Department of Labour to provide him with information relevant to an investigation of a refusal to provide information about the Algerian refugee Ahmed Zaoui.

This arises from the investigation of an official information complaint from Sarah Boyle, political adviser in the office of the Leader of the Opposition.

Aside from the statutory requirements that information sought by an Ombudsman should be provided to enable a review to be carried out under the provisions of the Official Information Act (OIA) 1982, Mr Smith says that any failure to do so has the potential to impact on the credibility of the holders of the information and public confidence in the efficacy of an Ombudsman's investigation.

The OIA forms part of the framework of New Zealand's constitutional arrangements, he says. Compliance with its provisions and observance of the processes adopted in respect of it therefore has particular significance.

An "*own motion investigation*" is designed to allow the investigation of any act or omission under section 13(1) of the Ombudsmen Act. An Ombudsman has the same powers as a Commission of Inquiry and may require any person to appear before him and give evidence.

In the case involving information about Mr Zaoui, Mr Smith says any omission by the Immigration Service to supply all relevant information as required by him will have affected the thoroughness of his investigation under the OIA, and thus will also have affected the complainant (Ms Boyle).

The "*own motion investigation*" includes, but is not necessarily limited to considering, three issues:-

- ❖ whether the Department of Labour (and the Immigration service in particular) had adequate procedures in place for responding to an Ombudsman on receiving a request for information made pursuant to section 19(1) of the Ombudsmen Act;
- ❖ whether and how these procedures were implemented in the case of Ms Boyle's complaint; and
- ❖ actions or conduct by departmental officials that may have caused or contributed to the apparent omission.

He says it is too early to predict when the investigation might be completed.

He has advised Parliament's Speaker Jonathan Hunt that he is initiating an "*own motion investigation*" pursuant to section 13(3) of the Ombudsmen Act 1975. He also has informed Minister of Immigration Lianne Dalziel, Minister of Labour Margaret Wilson, Secretary of Labour Dr James Buwalda, and National MP Murray McCully, who oversaw the original complaint.

Reason for seeking information

In a recent case a requester with a particular interest in lump sum payments as part of collective agreement settlements with public servants, thought he knew what the information was but wanted to confirm it. He sought copies of specified regular reports from the State Services Commission to the Minister of State Services which he thought had a direct bearing on what he was interested in.

The Minister advised the requester that these reports did not deal directly with the issue of these payments. That would not on its own have been a valid reason for withholding them, but the requester was satisfied with confirmation from the Ombudsman that the Minister was correct and with a general description of what the reports did contain.

There is no requirement for requesters to state a reason for requesting particular information. However, stating a reason will often allow a request to be responded to more effectively.

Recovering the cost of advice

A district council should not charge a resident for a consultant's advice when it is already aware of the law on which it can rely.

A resident wished to build a house on his section and was advised by the council that a resource consent would be needed because although the activity complied with the provisions of the operative district plan, it did not comply with the provisions of the proposed district plan. The resident's solicitor suggested to the council that the application be considered under the operative district plan only.

The council obtained the advice of a consultant, who confirmed the need to consider both plans, and thus the need for a resource consent. The council forwarded an account for the cost of the consultant's advice and, when payment was not forthcoming, took enforcement proceedings through the District Court. The resident complained to the Ombudsman.

While the council had the right to set a charge pursuant to s36 of the Resource Management Act, in this instance it already held relevant advice on the issue before it without having to seek further advice.

Accordingly, the Ombudsman formed the view that it was unnecessary for the council to have sought the advice that it did and that it was unreasonable to seek to recover the costs of that advice from the complainant. The council accepted this view.

Blanket ban not appropriate

It is not appropriate for any public agency to impose a blanket ban on members of the public. Each case must be considered on its individual merits.

An inmate complained to the Ombudsmen about a prison's imposition of a 12-month prohibition order on a family member. This followed an incident during which the family member was found on prison property with a small amount of cannabis and the inmate complained that the ban was unreasonable.

In justifying its decision, the prison maintained that this was consistent with its "zero tolerance" policy for drugs whereby a blanket 12-month ban was placed on anyone found with illegal drugs or alcohol on prison property.

The Department of Corrections agreed with the Ombudsman that a blanket ban regardless of the circumstances was not an appropriate approach for institutions to take. It was also agreed that each case in future would be considered on its own merits and that a set of guidelines reflecting varying degrees of transgression would be issued to each prison.

The complainant was advised to reapply for a review of the prohibition order, which would then be considered under the new guidelines.

Office not officials

Requests for official information are made to departments and organisations as a whole, and not to individual officers.

There was a complaint to the Ombudsman when a government department refused a request, where the response by one individual official advised the requester to make the request direct to another official within the same department.

Under s12 of the Official Information Act (OIA), requests for information are made to a department or organisation rather than to an individual official. Under s15 of the OIA, the department or organisation is responsible for deciding whether or not a request is to be granted and for notifying the requester of the decision.

Thus it is not open to an official to refuse to respond to a request on the basis that the requester has not directed their request to the correct person within the department, and to tell the requester to direct it to the correct person.

In fact, as the request is to the department as a whole, the officials receiving it should themselves direct it to the correct person, thus ensuring a response to the request is sent by the department within the 20-working-day time limit.

Information needs to be complete

Information provided by a Government department or agency should be complete.

There was a complaint that the Inland Revenue Department (IRD) had provided wrong information which had resulted in an interest cost. An Ombudsman's investigation showed the information had not been so much incorrect as incomplete, so the complainant could not appreciate the implications for his tax situation.

Because this seemed to be partly the fault of the complainant, who had not volunteered all the details which could have allowed the full position to be clarified, the Ombudsman considered it would be reasonable for the IRD to compensate the complainant partially for the loss sustained by relying on incomplete information.

The IRD accepted that the complaint raised issues about the duty of care appropriate and agreed to a partial remission of the loss.

Information that does not exist

When information is requested that does not in fact exist it is appropriate to decline it under s18(g) of the Official Information Act (OIA), but the requester must be advised that it does not exist.

There was a request from a Member of Parliament to three government departments relating to any initiatives or policies that the Cabinet approved before March 11, 2003, for inclusion in the 2003 Budget.

When the MP was refused on various grounds and took a complaint to the Ombudsmen, it emerged that none of the departments held any information relevant to the request because the Cabinet had not approved any policies or initiatives relating to the departments' Budget bids before March 11.

It would have helped if the requester had been told that no relevant information existed. That would have enabled the requester to make another, more refined request. Failing to advise that no relevant information existed denied the requester that opportunity.

Redirect to correct department

Where a request for official information is made to one department which considers it should have been made to another department, the first department may not refuse the request or direct the requester to the second department.

S14 of the Official Information Act (OIA) requires that a Minister, department or organisation must refer on any OIA request within 10 working days after the day on which it is received, if:-

the information is not held by the first Minister, department or organisation but is believed to be held by another Minister, department or organisation; or

the information is believed to be more closely connected with the functions of another Minister, department or organisation.

Under the same section, the requester must also be informed that their request has been transferred.