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The Ombudsman's jurisdiction and elected representatives

In a recent case a local authority councillor doubted "*the right [of the Ombudsman] to question the decisions of elected representatives*." The statutory function of the Ombudsmen is set out in Section 13(1) of the Ombudsmen Act:

"… it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the Departments or organisations named or specified in Parts I and II of the First Schedule of this Act, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part III of the First Schedule of this Act, or by any officer, employee or member of any such Department or organisation in his capacity as such officer, employee or member." (Local authorities are included under Part III of the First Schedule)

Thus the Ombudsmen are authorised to investigate the actions or decisions of elected representatives provided that they are acting in that capacity. Actions undertaken in a personal capacity are not subject to the Ombudsmen's jurisdiction.

However, it is important to note that the Act excludes actions and decisions of "*a committee of the whole"* (for example, a full council) from those matters that may be the subject of an Ombudsman's investigation. Decisions of individual council members or of a council committee (not being "*a committee of the whole*") may be subject to investigation.

It is not uncommon for an Ombudsman to ask an organisation for assistance by deferring substantive action on an issue before it pending the outcome of the investigation of a complaint. Often, such a request will be made when action by the organisation might hinder an Ombudsman's efforts to resolve the complaint, or when the action contemplated by the organisation would pre-empt the outcome of the investigation by altering the circumstances in the way in which the complaint to an Ombudsman was trying to prevent.

The Ombudsmen do not have the authority to compel an organisation to comply with a request of this nature. It is for the organisation to decide whether it is in a position to accede to the request, or whether its own priorities and obligations prevail. Nevertheless, an Ombudsman, in making his recommendations, is not precluded from commenting on the decision to proceed or proposing a remedy that may well be made difficult by the organisation's decision to proceed. However, we are pleased to acknowledge that in almost all cases, organisations do their utmost to assist us in this regard.

Official Information decisions must be made "as soon as reasonably practicable"

Decisions on requests

When an agency subject to the official information legislation receives a request for *"official information,"* that request must be considered and a decision made and communicated to the requester **as soon as reasonably practicable**, and in any event no later than 20 working days after the date on which the request is received.

However, the Ombudsmen continue to receive complaints from requesters that agencies believe they are under no obligation to respond any earlier than 20 working days, irrespective of the nature of the request.

Regrettably, investigation of such complaints often reveals a misconception among staff of some agencies about the true nature of their obligations to:

- decide whether a request is to be granted and, if it is to be granted, in what manner and for what charge,
- notify the person who made the request of the decision on the request, and
- if the decision is to grant the request, then to make the information available without due delay.

When the 20-day time limit was inserted in the Official Information legislation in 1987, Parliament made it clear that 20 working days should not be treated as the normal time period for making and communicating a decision, but should be the maximum, except in specific circumstances where an extension may be desirable.

The Law Commission in its 1997 report "Review of the Official Information Act" reinforced this view:

> *"We consider that the basic obligation upon agencies should remain to deal with requests as soon as reasonably practicable. This requirement remains paramount notwithstanding the existence of a 20-day time limit."*

There will be occasions where, given the nature of a particular request, it is reasonable to take close to 20 working days to make a decision on whether to grant the request. Indeed, there will be occasions when more than 20 working days are required and an extension of the maximum time limit for response is justified.

However, similarly, there will be occasions where a request is straightforward and a decision can be made well within the 20-day maximum time limit.

In such cases, the decision should be made and communicated to the requester straight away.

There is no justification to put the matter to one side on the purported basis that the agency doesn't have to respond *"until the 20 working days are up."*

The Act, in s15(1)(b), does not limit how the notification of the decision is conveyed. The phrase "give or post" encompasses verbal or written notice whether by letter, e-mail or telephone call.

While it may be preferable administratively to confirm communications in writing, where time is urgent, there is no reason that initial verbal communication should not be utilised.

It is also important to note that the Act distinguishes between the time period for making a decision on a request and the time period for making the information available in cases where requests are granted. While the Act provides that failure to make and communicate a decision on a request within the maximum time limit is deemed to be a refusal, it separately provides that undue delay in making information available in response to a request is also deemed to be a refusal.

In short, having made a decision to grant a request, an agency should endeavour to make the information available straight away.

Decisions on transfers

Where agencies consider a particular request for official information should be transferred to another agency, there is a similar obligation to make the decision about transfer promptly, and in any case not later than 10 working days after the date on which the request is received.

While, in some cases, it may not be immediately apparent whether transfer is appropriate, the Act allows for an extension of the 10 working day limit where a large volume of information is involved or where consultation with other agencies is necessary.

The intent of the legislation is that an initial assessment of whether the information requested is held, or whether transfer of the request is appropriate, should take place as soon as possible after the request is received.

Again, any perception by agencies that they have *"up to 20 working days"* to commence consideration of a request is wrong.

Delay in assessing qualifications

A request by a public health worker for assessment by the New Zealand Qualifications Authority (NZQA) of his overseas qualifications took nearly six months to process. The applicant had sought urgency in the process as he could not be employed in the new position he had been offered until the assessment had been completed.

As a consequence of the prolonged assessment time, the applicant had been unemployed for four months. He complained to the Ombudsman that the delay was unreasonable and that the *ex gratia* payment offered by NZQA was unacceptable in the circumstances.

The Ombudsman considered that the elapsed time from receiving the application to completing the assessment could be attributed to unnecessary delays in the NZQA process. The NZQA accepted this, agreed to waive the application fee and agreed to meet quantifiable costs including salary associated with the delay.

Need for substantiated reasons

An inmate considered his prison security classification – at low/medium – had been assessed unreasonably and complained to the Ombudsman. Strong reasons were needed to retain him at this level rather than placing him on minimum security.

Prison management maintained that an uncorroborated, verbal statement by another inmate, of which no record had been made, constituted the "*strong reasons".*

The complaint was upheld. The Ombudsman considered that an inequitable situation could arise if reliance was placed on unsubstantiated and unrecorded information from another inmate who might have had something to gain by making such a statement.

Also, the higher security classification could have had implications for a Parole Board hearing by affecting the chance for the inmate to be granted day parole and home leave.

Telephone Access to Lawyers

Prison remand inmates have telephone access to lawyers as of right, but some have been complaining that their telephone calls have been restricted to two days a week.

Their prison had taken this step because of the number of inmates requiring such calls. It considered that having the service available for two days a week was reasonable access.

The Penal Institute Regulations state that a superintendent *"must ensure that a remand inmate has access to a telephone at all reasonable times …*" Prison management was advised of this, reconsidered the matter and reverted to allowing such calls on a daily basis.

Lost in cyberspace

Trouble may arise if an e-mail is sent without first checking the spelling, whether the individual is still employed at the address and whether the email address has been changed. A visit to the web site of the department or organisation holding the information should overcome this.

All three have been occurring, with the result that some communications were lost in cyberspace.

While the Official Information Act (OIA) does not require official information requests to be addressed to the head of a department or organisation, the Ombudsmen recommend it as being a good practice.

Although any employee of an organisation may similarly respond to a request for official information, sending the e-mail to the organisation's head may overcome any practical difficulties.

CONSOLIDATED INDEX

This is a Consolidated Index of articles appearing in the nine most recent issues of the Ombudsmen Quarterly Review – running from June 2001 to June 2003. It is to be interpolated into the Index already on the Ombudsmen web site. The first number is the folio (year) – 7 being 2001, 8 being 2002 and 9 being 2003 – and the second number is the issue (quarter). An Index of the first six years – 1995 to 2000 – is also incorporated in the web site.