Volume 10, Issue 1. March 2004
ISSN 1173-5376

Editorial

HANDLING OIA REQUESTS – CORE DEPARTMENTAL BUSINESS

In recent times, our office has handled increasing requests to assist departments and organisations in their review of internal policies, guidelines and training programmes relating to the handling of Official Information Act (OIA) requests. It therefore seems timely to reiterate key considerations that should underpin policy on how staff of departments and state sector agencies should approach OIA requests.

Firstly, as recognised by the Court of Appeal, the OIA is of such "permeating importance" that "it is entitled to be ranked as a constitutional measure" (Cooke P in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 391). Departments and organisations subject to the OIA have a statutory responsibility to meet the requirements of the legislation. Therefore, the handling of OIA requests should be treated by their staff as core business.

Secondly, the OIA requires a case-by-case approach. Often the outcome of individual requests will turn on a value judgement between competing public interest considerations. Departments and organisations need to develop clear policy guidelines for staff to assist adequate and timely processing of OIA requests. However, policy guidelines on their own will not guarantee adequate compliance. No single policy document or set of guidelines can predict all possible solutions that may arise in practice. Reasonable processes are likely to result in reasonable outcomes, but often circumstances will require "intelligent" judgement rather than "mechanical" application of process. Staff need to receive training in how to make such judgements.

Accordingly, departments and organisations need to provide -

- adequate ongoing training for staff on how to apply policy guidelines;
- regular review of policy guidelines to update or remedy any omissions which are identified in specific cases; and
- adequate staff resources to process requests in a timely manner.

Delivery of adequate resources and ongoing staff training require senior management to take proper responsibility for ensuring satisfactory compliance with the OIA. Such compliance should be just as important for departments and organisations as other statutory obligations and, given the timeframes in the OIA, may often need to be given priority.

While the Ombudsmen are not responsible for delivery of OIA training programmes, overall we will do our best to help agencies with information and comments as they develop their own training programmes.

John Belgrave	Anand Satyanand	Mel Smith
Chief Ombudsman	*Ombudsman*	*Ombudsman*

Transferring Official Information Requests

Under the Official Information Act (OIA), the agency that receives a request must make a decision on that request unless it is transferred in accordance with s14 of the Act.

Section 14 obliges an agency to transfer a request where the information to which it relates -

(i) is not held by the agency but is believed by the person dealing with the request to be held by another agency; or

(ii) is believed by the person dealing with the request to be more closely connected with the functions of another agency.

It is clear, therefore, that the obligation to transfer arises *only* in these particular circumstances. In the absence of these circumstances, the agency that receives the request must make a decision on it.

It is important to note that while the obligation to transfer arises only in these circumstances, nothing in the OIA prevents an agency from consulting other interested parties before making the decision.

An Ombudsman's review

An Ombudsman's jurisdiction under the OIA does not include the investigation and review of an agency's decision to transfer a request for official information.

However, such a decision may nevertheless be the subject of an investigation under the Ombudsmen Act, if the decision was made by a body subject to that Act. A requester can, therefore, seek an Ombudsman's review of a decision to transfer their request.

When reviewing such a decision, an Ombudsman will consider whether either of the circumstances in s14 can be made out. If it appears a transfer was effected in the absence of these circumstances, it would be open to the Ombudsman to conclude that this transfer was contrary to law, in terms of the Ombudsmen Act.

A Policy of Transfer

In recent cases, it has been apparent that some agencies have operated a policy of transferring all official information requests for similar information, or from the same source – such as the news media or Opposition parties.

Blanket policy decisions of this kind cannot be justified in terms of the OIA. It obliges an agency to consider and decide on each request separately, and on its own merits.

A RESPONSE MUST BE SENT TO EVERY REQUEST

From time to time, when dealing with a difficult requester, a Government department may reach the point where it contemplates not sending responses to the requests for official information that are being made.

It is appreciated that at times a department may become frustrated by a particular requester. There are mechanisms in the Official Information Act (OIA) to deal with this, under sections 15A, 16 and 18.

However, a department must still meet its obligations under the OIA, and these will not have been met if the department decides not to send any response at all to a request for official information.

The OIA requires a response to be sent to any request for official information made in accordance with s12 of the Act. Section 15(1) of the OIA provides:

"Subject to this Act, the Department or Minister of the Crown or organisation to whom a request is made … shall, as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that Department or Minister of the Crown or organisation, -

(a) Decide whether the request is to be granted and, if it is to be granted, in what manner and for what charge (if any); and

(b) Give or post to the person who made the request notice of the decision on the request."

There may be a basis under s18 to refuse a request for information. However, even where a department has decided to refuse a request, the OIA still requires notice of this decision to be sent to the requester.

It is not open to the department to elect not to send any response at all to a request for official information, even where the department has previously told that person that it will not be responding to any further correspondence on a particular matter.

Investigation into New Zealand Immigration Service

Ombudsman Mel Smith has completed an Own Motion investigation into the New Zealand Immigration Service in which he found that instead of complying with the requirements of the Official Information Act (OIA), two members of staff failed in their official duties. As disclosed by the facts and the evidence given, the Department of Labour had failed to provide information required for the purposes of the Official Information Act.

When an Ombudsman is dissatisfied with the way his call for information from a Government department or agency has been dealt with then, under s19 of the Ombudsmen Act, he can issue a summons and hear evidence under oath.

This was a rare case in which he did, and if still dissatisfied he could have entered premises and seized documents.

"*The public service is generally very dedicated and free from corruption,"* he said, *"and I would not want to have to resort to entering premises and seizing documents. But the public service needs to recognise the constitutional significance of the OIA. It is part of the transparency and accountability process, and contributes to the avoidance of corruption in the public service.*"

Any department or organisation subject to the Official Information Act inevitably acts through its officials and employees. A degree of responsibility and autonomy will necessarily reside with the person who is allocated or delegated the duty of dealing with a complaint to an Ombudsman. The department or organisation must ensure that the relevant person has adequate training, and is of sufficient seniority reasonably to take that responsibility.

The report of the Danks Committee into Official Information in 1980, on which the OIA is based, said:-

"*The case for more openness in Government is compelling. It rests on the democratic principles of encouraging participation in public affairs and ensuring the accountability of those in office. It also derives from concern for the interest of individuals. A no less important consideration is that the Government requires public understanding and support to get its policies carried out. This can only come from an informed public."*

The Ombudsman considered the New Zealand Immigration Service and the responsible officials within it had "*failed to produce to me as I required under the OIA a particular document that a person had properly tried to obtain and had been refused*".

Settlement in paper war

Over a two-year period a requester made many requests to the New Zealand Defence Force (NZDF) about the management of its inventories, particularly uniforms and boots. Each release of information led to further requests on another aspect of NZDF inventory management. Delays in the supply or refusal of information led to an ongoing involvement by the Ombudsman.

With little prospect of peace in this paper war, the Ombudsman proposed to the requester that he accept an offer from NZDF to meet him face to face to discuss the range of matters still of concern to him.

Such an approach is contemplated by s16 of the Official Information Act, where information is comprised in a "document" – which is given an extended definition in the Act. While information should generally be given in the form sought by the requester, an exception may be made where to do so would impair efficient administration. S16(1)(f) says an acceptable alternative may be to make the information available *"by furnishing oral information about its contents".*

The Ombudsman considered that, with good faith on both sides, such a briefing should place the requester in a much better position to obtain quicker (oral) responses to his (oral) requests for information, including supplementary requests, that might arise. If, after the briefing, he were still dissatisfied with the NZDF's responses – including if it claimed that the information did not exist – then it remained open to him to approach the Ombudsman again.

The requester's meeting with the NZDF did meet his information needs. That led to him withdrawing his remaining complaint.

A discretionary power can be reviewed by an Ombudsman

A decision by the Commissioner of Inland Revenue or delegated officers to make, or not to make, an *ex gratia* payment to a complainant represents the exercise of a *"discretionary power*." As such, it constitutes a *"matter of administration"* which could be the subject of a review by an Ombudsman under the Ombudsmen Act.

A complainant had referred to the Ombudsman a case in which the Inland Revenue Department (IRD) had decided no *ex gratia* payment should be made.

An Ombudsman has no power to direct the IRD to offer a particular level of compensation. If a complainant should disagree with a decision that is within an Ombudsman's jurisdiction to investigate, that does not in itself provide grounds for complaint.

An Ombudsman's investigation is not an appeal process whereby an Ombudsman forms his own views on what the decision should have been. It is an investigation of whether the decision was properly arrived at and, if so, whether it was reasonably open to the department to make that decision.

In this case, having considered the circumstances, the Ombudsman questioned whether the IRD might not reconsider its decision not to make an *ex gratia* payment, and that has been done.

Correction

An article in the December 2003 issue of the "Ombudsmen Quarterly Review" entitled "Delay in assessing qualifications" may have given the impression that the NZQA was responsible for a delay of six months in assessing an applicant's qualifications.

That is not correct. The Ombudsman formed the view that only seven weeks of the elapsed time from receipt of application to completion of assessment (six months) could be attributed to delays in the NZQA process. This view was accepted by NZQA.

The Office of the Ombudsmen regrets that the article may have caused some confusion and has apologised to NZQA.

Prison inmate file management

In a recent complaint to the Office of the Ombudsmen and the Privacy Commissioner, it became apparent that a large amount of documentation had been placed on an inmate's file, which should not have been there.

Much of the information related to the Police investigation of the offending and their prosecution of the case; it included Police job sheets, briefs of evidence, and letters to and from the inmate's solicitors.

It was not clear how this information had come into the possession of the Department of Corrections.

Public Prisons Manual G.02 Inmate File Management (National Policy) lists information which is to be placed on an inmate's file. Essentially, it is information which is lawfully collected and necessary for the management of the inmate and their sentence.

If staff come into possession of any other documents relating to an inmate, which are not relevant and not listed in G.02, they should be returned either to the source, the inmate, or the inmate's property.

Poor management can create responsibility

Where a Government agency has managed a file poorly, that can create a responsibility to meet reasonable obligations.

A state employee had been obliged to switch superannuation schemes, away from the National Provident Fund (NPF).

The employee's family argued that he had not been told that in the event of his death his widow would have no entitlement under the second scheme. The Fund, on the other hand, argued that such knowledge had been provided. There was no documentary evidence as to precisely what had occurred.

The Ombudsman is not a Court. Where the facts are in dispute it is not a function of an Ombudsman to listen to opposing versions and to make a determination as to which version is correct. But in this case the balance of probability lay against the employee being aware of the consequences of changing funds.

The NPF accepted this and suggested, and implemented, a remedy that a pension be paid as if the employee had remained in the original scheme.