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Editorial

PRIVACY NOT A SHIELD AGAINST LEGITIMATE SCRUTINY

Preservation of personal privacy is an important interest which should not be treated lightly. However, it is not an absolute interest that will always override other considerations. In the context of the Official Information Act (and Local Government Official Information and Meetings Act) many requests will encompass information that relates directly or indirectly to identifiable individuals. Although public sector agencies need to consider whether disclosure of such information may infringe the privacy of any persons, they must also take into account any considerations favouring disclosure.

In short, the official information legislation recognises that in certain circumstances personal privacy should properly give way to the public interest considerations favouring disclosure.

The need to weigh competing privacy and public interest considerations often arises in relation to requests for information about how and why particular actions, recommendations or decisions of public sector agencies came to be taken. In a free and democratic society like New Zealand, it is quite proper for individuals, special interest groups and the media to request such information.

The reasons for such requests can be many and varied. In some cases, requesters are seeking to promote the accountability of public sector officials in their administration of laws or policies. In other cases, they are seeking information to assist their pursuit of a fair determination of rights. Whatever the reasons for individual requests, there is no basis to ignore legitimate public interest considerations favouring disclosure of timely and adequate information in particular cases.

There is still a tendency for public sector officials to refuse requests simply because the information relates to persons other than the requester. Early consideration of alternative forms of disclosing information, such as release of documents with deletions or making information available in summary form, is often overlooked. Such mechanical responses are wrong and risk undermining public confidence in both the Privacy Act and the Official Information Act.

Privacy should not be used as a shield to avoid legitimate scrutiny.

REVIEWING THE EXERCISE OF DISCRETIONARY POWERS

A significant number of the complaints investigated under the Ombudsmen Act 1975 relate to decisions or recommendations by public sector officials exercising discretionary powers. Complaints about the way in which discretionary powers are exercised can arise in many contexts within central government, local government, statutory boards, health, educational and other public sector organisations.

The starting point of a complaint is the complainant's dissatisfaction with the outcome of a decision-making process. However, an Ombudsman's investigation of whether the decision or recommendation is reasonable invariably focuses on the process by which the decision or recommendation was reached. In the context of public sector officials exercising discretionary powers, the process issues are not always clear to either the complainants or the public sector officials concerned.

The following summary incorporates in large part a very helpful fact sheet published by the NSW Ombudsman's office, which has kindly consented to its reproduction in this article.

What are discretionary powers?

Discretionary powers are permissive, not mandatory. They are powers conferred either directly by enactment or by delegation which do not impose a duty on the decision-maker to exercise them or to exercise them in a particular way. Within certain constraints, decision-makers are able to choose whether and/or how to exercise discretionary powers.

How must they be exercised?

Public sector officials do not have unfettered discretionary power. They must exercise discretionary powers in accordance with any applicable legal requirements, reasonably, impartially and avoiding oppression, injustice or improper discrimination.

In general, public sector agencies should adopt policies and procedures which set out the general approach to be followed in at least each major area of activity for which they are responsible. Agencies should try to ensure that their powers are exercised consistently from case to case, unless the merits of any particular case justify a different approach.

Relevant administrative law principles

In exercising discretionary powers, various principles of administrative law **require** public officials to:

- use discretionary powers in good faith and for a proper purpose (i.e. honestly and only within the scope and purpose for which the powers are given);
- base their decision on logically probative material (i.e. logical reasons, information that proves the issues in question, relevant and reliable evidence);
- consider only relevant considerations and not consider irrelevant considerations;
- give adequate weight to a matter of great importance but not give excessive weight to a relevant factor of no great importance;

- exercise their discretion independently and not act under the dictation or at the behest of any third person or body;

- give proper, genuine and realistic consideration to the merits of the particular case, and not apply policy inflexibly; and

- observe the basic rules of procedural fairness (i.e. natural justice).

Other principles of administrative law **preclude** public officials from:

- making decisions in matters in which they have an actual or reasonably perceived conflict of interest;

- improperly fettering their own discretion (or that of future decision-makers) by, for example, adopting a policy that prescribes decision-making in certain circumstances;

- exercising a discretion in a way that is so unreasonable that no reasonable person would have exercised the power in that way;

- exercising a discretionary power in such a way that the result is uncertain;

- acting in a way that is biased or conveys a reasonable perception of bias;

- making decisions that are arbitrary, vague or fanciful;

- refusing to exercise a discretionary power in circumstances where the decision-maker is under a duty to do so; or

- unreasonably delaying the making of a decision that the decision-maker is under a duty to make.

It would be a serious matter for public officials to ignore valid advice or valid considerations, particularly for the purposes of avoiding discomfort or embarrassment on the part of the government, agency or decision-maker.

Policies and practices to guide the exercise of discretionary power

Not every situation demands a policy. Policies are not a panacea capable of properly addressing all circumstances. However, policies are an important means of guiding decision-makers in exercising discretionary powers appropriately, consistently and fairly. Policies should include an objective and the criteria to be used in decision-making to help ensure that:

- all relevant legal requirements are complied with;
- all relevant factors are considered;
- there is consistency in decision-making; and
- the decision-making process is transparent and accountable.

As a matter of principle, it would be unacceptable for an agency to adopt and implement a policy that adversely affects, or could adversely affect, the rights or interests of any member of the public where the existence or content of the policy is kept secret or the policy document is not available on request.

Policies adopted by agencies should be freely available to relevant staff and members of the public. In this regard, s.22 of the OIA (s.21 LGOIMA) provides that every person has a right to request and be given access to any document (including a manual) held by Ministers or departments or organisations or local authorities, which contains policies, principles, rules or guidelines under which decisions or recommendations affecting any person or group of persons (in their personal capacity) are made.

Government circulars, memoranda and codes of practice

There is usually no legally enforceable obligation to comply with government circulars, memoranda and relevant industry or generally accepted codes of practice. However, in the interests of fairness, equity and consistency, decision-makers should have regard to them and comply with their terms unless there are justifiable, and preferably documented, reasons for taking another course of action.

Implementing policies and procedures consistently

Policies should not be applied rigidly without proper consideration of the particular circumstances and merits of each individual case. There will be occasions where there are justifiable grounds for not following policies. Where an agency, with good and preferably documented reasons, departs from a consistent application of policy, this does not create a precedent which binds the agency. Such decisions are relevant and important considerations, but are not binding. Conversely, where an agency frequently departs from or ignores a policy, the policy would seem to have little weight or relevance and would need review.

Unless there is provision for both:

- adequate ongoing training for staff in how to apply policies, and

- regular review of policies to update and remedy any deficiencies which are identified through specific cases,

then implementation of policies and procedures may not be as consistent and effective as hoped for.

Obligations of confidence and the competing public interest

In certain circumstances, s.9(2)(ba)(i) of the OIA may protect information subject to an obligation of confidence. However, it is always necessary to weigh the need to withhold the information against any competing public interest in its release.

A recent case arose in the context of a mother seeking information held by a school Board of Trustees. Her daughter was one of three students who had complained about the behaviour of a teacher aide. At the daughter's request, the complaint and subsequent investigation had not been disclosed to the mother.

When the mother learned of the complaint, she requested a copy of her daughter's statement. However, in the absence of the daughter's consent to release the statement, the BOT refused the mother's request. The BOT considered the statement had been provided in confidence, and its release would discourage other pupils from making complaints in a similar situation.

On the one hand, the Ombudsman considered the BOT did owe the student an obligation of confidence. He also thought it was in the public interest that students not feel constrained from providing similar information in the future. On the other hand, he recognised a strong public interest in parents having access to information about their children's education and wellbeing.

In this case, the Ombudsman concluded that the public interest in release did not outweigh the need to withhold the information. Under the Education Act, principals are required to take reasonable steps to ensure parents are told of matters "*preventing or slowing the student's progress through the school*" or "*harming the student's relationships with teachers or other students*". However, there was no cause to believe issues of this nature had arisen here.

COMPANIES CAN REQUEST PERSONAL INFORMATION UNDER THE OIA

When an individual requests personal information about himself or herself, that request must be dealt with under the Privacy Act, and any complaint is considered by the Privacy Commissioner.

However, if a body corporate (i.e. a company) requests information held about itself by a government department or organisation, then that request must be considered under Part IV of the OIA. If a request is refused, then a complaint may be made to an Ombudsman.

A company has the right to request access to any information held about itself which can be readily retrieved (s. 24 OIA). The usual requirements of the OIA apply in relation to transfers, time limits for making a decision, notification of a decision, and how information may be provided (ss 14-17 & 19 OIA).

However, the government department or organisation holding the information must also take precautions to ensure access to the information is given only to the company concerned (s.25 OIA). The company has the right to request correction of the information if it is believed to be inaccurate, or incomplete and giving a misleading impression, and must be informed of that right if information is released (ss.24(3A) & 26 OIA).

The grounds on which information may be withheld from a company requesting information about itself are more limited than those applying to general official information requests.

The grounds for withholding information are set out in s.27 of the OIA, and include situations where disclosure would prejudice any of the interests protected by ss.6(a) to (d), 7, or 9(2)(b) of the OIA, involve the unwarranted disclosure of the affairs of another, or breach legal professional privilege.

MPs not subject to OIA

Occasionally, complaints are made about a refusal by a Member of Parliament to release information in response to a request. In such a case, an Ombudsman is not able to assist.

MPs are not subject to the OIA in their capacity as MPs. Therefore, they are not required under the OIA to provide information in response to a request, and an Ombudsman has no authority to investigate any complaint about an MP's refusal of a request.

Section 12 of the OIA limits requests for official information to "*a Department or Minister of the Crown or [government] organisation*". The OIA does not allow requests to be made to MPs.

"*Official Information*" is defined in s.2 of the OIA as "*…any information held by…a Department; …a Minister of the Crown in his official capacity; or…an organisation*". An MP who is also a Minister will therefore be subject to the OIA, but only in relation to information held in his or her capacity as a Minister.