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Editorial: Complaints about Public Tender Processes

From time to time Ombudsmen receive complaints relating to public tender processes. Complaints are received not only from unsuccessful tender applicants but also from members of the public, special interest groups or other third parties who have concerns about the integrity or cost-effectiveness of a public tender process.

In general terms, complaints about the tender process relate to either:

- requests for information relating to the tender process; or
- complaints about the conduct of tender process itself and its outcome.

Requests for information are often a logical precursor to complaints about process or outcome.

For public sector agencies and local authorities, requests for information they hold about tender processes must be considered under the OIA or LGOIMA. In most cases, the key issue is the relative weight of competing public interest considerations. On the one hand there may be legitimate concerns about the need to protect certain information relating to the commercial positions of parties who have participated in the tender process. On the other hand there is the public interest in disclosure of adequate information about public tender processes to promote transparency, integrity of the process and accountability for the expenditure of public funds. Participants in public tender processes must accept that they cannot unilaterally draw a curtain of confidentiality over the process.

The right to information is also relevant where unsuccessful tenderers request the reasons why they were not awarded tender contracts. Pursuant to section 23 of the OIA (section 22 of LGOIMA), unsuccessful tenderers have a legal right to request a statement of reasons for the decision not to award them tender contracts.

Release of information about tender processes and the reasons for decisions taken will not always resolve concerns about the integrity of the process. Complaints are nevertheless received that the process or the outcome were unreasonable or discriminatory or unfair or just plain wrong. In such circumstances, an Ombudsman may be able to investigate complaints about the tender process. The types of complaint that can arise include:

- misapplication of the pre-tender process resulting in improper exclusion from the tender process;
- failure to ensure that all prospective tenderers get similar information about product expectations and the process to be followed;
- conflict of interest in decision-making process;
- outcome inconsistent with published criteria and process.

The nature of the public tender process will often generate queries about the adequacy of the process and the fairness of the outcome. Our experience is that in order to promote accountability and public confidence, purchasing agencies need to clearly identify at the outset their objective and the process they are going to follow and ensure unambiguous communication of that to all relevant parties.

John Belgrave
Chief Ombudsman

Anand Satyanand
Ombudsman

Mel Smith
Ombudsman

Southern Institute of Technology

A report has been tabled in Parliament by Ombudsman Mel Smith on his investigation under the Ombudsmen Act (OA) of a complaint against the Southern Institute of Technology.

Six former students of the Institute complained that they had enrolled in a two-year course of study which had then not been proceeded with, and that the remedy offered by the Institute had been inadequate and unreasonable.

They had begun legal proceedings but at a judicial settlement hearing had been advised by the presiding Master that their claim was unlikely to succeed. They then approached the Ombudsman.

It was clear to the Ombudsman that whatever the Institute's legal position, it had made certain administrative decisions affecting the students. That being so, the reasonableness of the Institute's decisions fell properly within his jurisdiction.

He considered the Institute had acted unreasonably and recommended it reimburse the students the course fees and related expenses of each of the complainants - totalling $20,907.56.

This the Institute declined to do. It said that the agreement reached at the judicial settlement conference was a full and final settlement of the grievance. The Ombudsman then asked to be provided with the details, including a copy of any deed of settlement or agreement. No such document was produced.

The Institute still refusing to give effect to his recommendation, the Ombudsman sent a copy of the documentation to the Prime Minister (as he is obliged to do) before having his report tabled in the House. Parliament conducted a snap debate on the subject pursuant to Standing Order 376 as a matter of urgent public importance.

In responding to the Report the Prime Minister said it was of serious concern to her that the Institute had declined to accept the Ombudsman's recommendation. She asked that he and the Associate Minister of Education (Tertiary) meet to discuss how students in cases such as this could be given better protection.

Information on water quality

Local authorities routinely test for water quality and the results of these tests should be made available to the public.

Water quality is sometimes taken for granted and it may be only when contamination has occurred that questions are raised about local authorities' procedures for ensuring that the quality of drinking water is of sufficient standard.

In a recent case, after contamination of a local supply from stock troughs, a resident requested the results of future water quality testing so he could place them on the local community notice board, serving as a notice to residents and visitors to the area.

The local authority declined the request and said that if the test results did show contamination then it would immediately introduce procedures to correct what had occurred. The Ombudsman considered that there is a strong public interest to be served in Councils making information available in relation to water quality. Following discussions with the Council, it agreed to post all the results of its water quality testing on its website.

Good practice when seeking submissions

Access to submissions made to a government department may be requested under the Official Information Act (OIA). As a matter of good administrative practice, and in order to process requests for copies of submissions more efficiently, government departments should consider including an explanatory statement when any submissions are called for.

The following statement has been used in the past:-

> "Submissions to the Department may be required to be disclosed in response to any requests under the Official Information Act... If you are an individual, as opposed to an organisation, the Department will consider removing your personal details from the submission if you tick the box below..."

The matter arose when the Department of Conservation called for submissions from the public on a conservation discussion document. The Department did not provide any indication of what would happen to the submissions once received.

A newspaper requested copies of the submissions and the Department was then faced with the issue of whether the submissions should be released under the OIA. The Department decided to provide the submissions to the newspaper and deleted all information from them that would identify who the submitters were. Some submitters had been organisations but some had been individuals.

A complaint was made to an Ombudsman about the deletions, and the view was formed that there was no good reason under the OIA to withhold the names of the organisations. However, there was good reason under s.9(2)(a) of the OIA to withhold the identities of those individuals who had expressed concerns that the release of their identity would interfere with their privacy.

As part of the investigation into the complaint, the Ombudsman sought comments from the individuals who had made submissions. A common theme arising from these consultations was a concern that the Department had not, when calling for submissions, advised that copies of the submissions might be sought from the Department. This demonstrates the value of including an explanatory statement at the outset.

Prejudice maintenance of the law

If in particular circumstances disclosure of information would be likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences, then s6(c) of the Official Information Act (OIA) provides good reason to withhold that information.

There was a complaint to the Ombudsman that details sought from the Inland Revenue Department, which it was alleged had been "supplied falsely and with vindictive intent," were being withheld from the person to whom the information referred.

S6(c) of the OIA provides conclusively for the withholding of information and, unlike s9 of the OIA, there is no statutory requirement to consider any countervailing public interest matters favouring release of the information.

To meet the test under s6(c) it is necessary only to establish whether disclosure of the information at issue would prejudice the maintenance of the law including the prevention, investigation and detection of offences, and whether it is likely that such prejudice would occur.

In general terms, successive Ombudsmen have accepted that Departments and organisations which have statutory law enforcement functions rely quite significantly on the public for information to assist them discharge those functions.

The general approach has been to accept that disclosure of the identity of an informant would create such a prejudice. However, each case must be dealt with on its own merits. In this case, the Ombudsman was satisfied that the release of the identity of the informant would be likely to prejudice the maintenance of the law, that the informant acted in good faith and that the information supplied to the Department was not false.

The Ombudsman was unable to explain in any detail how the prejudice in this case would arise, because to do so would require disclosure of information that would likely lead to the identity of the informant, thereby resulting in prejudice to the very interests protected by s6(c) of the OIA.

Public access to foreshore

The use of local authority reserve land next to the foreshore can be contentious when questions arise over rights of public access to reserves that are on camping grounds.

Typically, part of any land controlled by a local authority may be used as a camping ground, or leased for that purpose. Right of public access to recreation reserves is a provision of the Reserves Act 1977.

In a recent matter referred to the Ombudsman, fences had been erected on the foreshore boundary of a camping ground that excluded the public. There had previously been signs that had declared public access, but these had been removed, and hedges had been extended across the reserve towards the foreshore by owners of adjoining land. These hedges formed a barrier to members of the public who wished to walk along the reserve adjoining the beach.

The local authority was reminded it had a statutory obligation to administer reserves in such a way as to maintain and enhance public access, and it corrected the situation.

Official information held at different locations

Where official information is held in different locations there is no statutory obligation on the holder to centralise it. But if the request for the information is to be dealt with in a timely manner and with full consideration of the issues, it is often useful to move the information to a central place.

The different geographic locations where official information is held, even by the one organisation, can be diffuse. Information sought under the Official Information Act (OIA) and also under the Local Government Official Information Act (LGOIMA) can be held in different cities or towns where the organisation(s) may have branches or service centres.

Information may also be held by several different agents, such as contractors and/or solicitors for the organisation that technically "holds" it.

While a requester under the OIA may specify the way they prefer to receive the information, one of the ways in which the information can be made available is by the requester being given a reasonable opportunity to inspect the documents, which may involve centralising them.

One benefit of doing this is that the holder of the information can be satisfied that the request has been dealt with properly, while the requester has the benefit of not having to try to view the information in several different locations.

Access to court files

Access to information contained on court files is usually not a matter for an Ombudsman, although questions arise occasionally.

The relevant rules of court generally provide a mechanism controlling the provision of such information, and ss13(7)(a) or 17(1)(a) of the Ombudsman Act will be invoked. However, under the provision in s13(7)(a), an Ombudsman does have a discretion to intervene if there are special circumstances rendering it unreasonable for the curial remedy to be pursued.

Unfortunately, there is no single set of court rules to which reference can be made and it is essential to ensure that the rules governing a particular jurisdiction are consulted. (It would not be practicable in this item to bring together all the relevant references.)

A defendant in recent criminal proceedings in the summary jurisdiction of the District Court applied for a copy of the record of those proceedings.

At first it was thought that the Criminal Proceedings (Search of Court Records) Rules 1974 would apply but in the District Court they apply only to jury trials. The court record of summary proceedings is governed by s71 of the Summary Proceedings Act which does not deal explicitly with the process of obtaining a copy.

It appears, however, that District Courts may rely on a limited inherent jurisdiction to control their own procedures, and therefore District Court Judges do have power to grant leave to inspect or copy court records - L v Police [2000] 2 NZLR 298.

It was also thought that the Court had power to require a fee to be paid for the copy record, but the Second Schedule to the Summary Proceedings Regulations 1958 does not provide for the payment of fees where the requester is a party to the proceedings.