

Editorial:

Urgent requests under the Official Information Act

The Official Information Act requires decisions on requests to be made “as soon as reasonably practicable”. However, in some cases that will not be soon enough for a requester. Both the OIA and LGOIMA recognise that there will be occasions where requesters will need to ask that their requests be treated as urgent. Where urgency is requested, applicants must give their reasons for seeking the information urgently.

The purpose of this requirement is not only to enable the agency holding the information to identify the public interest considerations requiring urgency but also to enable the information holder to identify alternative options that may enable a satisfactory response to be provided more quickly. There is no obligation on agencies to process requests faster than “as soon as reasonably practicable” simply because a requester demands urgency. However, where reasons for urgency are given, agencies need to bear in mind that in certain circumstances there will be compelling reasons to give greater priority to responding urgently within a time deadline.

Much is often made of the delays that can occasion requests under the OIA or LGOIMA. Sometimes delays are unjustified. On other occasions requests may cover a large volume of information or raise complex issues that are not capable of quick resolution; in these cases a measure of delay is sometimes inevitable.

In a recent case, covered in more detail on page 4, a requester needed access to information urgently to assist in making submissions to a select committee. The request was refused and requester sought an urgent investigation and review under the OIA. The complaint was received 3 days before the deadline for submissions. The public interest considerations favouring urgency were acknowledged and, although the department still had concerns about release, a satisfactory resolution was achieved within 72 hours which enabled the submissions to be completed.

While some cases can and do become protracted, other matters, both requests and Ombudsmen investigations, can be resolved very quickly. Any inference that the OIA or LGOIMA are incapable of addressing urgent requests for information is simply wrong. Sensible and time sensitive options are often available but are sometimes overlooked by requesters and agencies alike.

Recording and Giving Reasons for Decisions

Recording and giving reasons for decisions and recommendations made by government departments and organisations is a matter of good administrative practice and serves to promote accountability.

For a person who is the subject of, or otherwise personally affected by, a decision, knowing the reasons for that decision can make it easier to assess whether the decision was in fact fair and reasonable, and to understand and accept the decision even if it is perceived to have an adverse effect. Alternatively, knowing the reasons for a decision may help a person to decide whether or not it should be challenged. It is also helpful, where a decision is made under delegated authority, to know that the decision-maker is duly authorised to make that decision.

For departments and organisations, recording and giving reasons help to ensure that decision-makers avoid arbitrary procedures and make well-founded decisions, thus enhancing the quality of the decision-making process.

These considerations were highlighted by the Court of Appeal in *Singh v Chief Executive, Department of Labour* [1999] NZAR 258 (at 262-263), where the rationale for giving reasons was discussed:

- “1. *The discipline on the decision maker itself: it is commonplace that preliminary views can be changed when the process of thinking through the reasons and writing them down is undertaken.*
2. *Assurance to those affected that their evidence and arguments have been assessed in accordance with the law...*
3. *Assistance to those affected in deciding whether to challenge the decision, for instance by appeal, review or other complaint mechanism – since the statement of reasons may satisfy them that they have no real prospect of a successful challenge.*
4. *If a review is mounted, assistance to the parties, counsel and deciders engaged in the review.*
5. *The establishment, where appropriate, of a body of precedent or at least of guidance, governing or affecting the exercise of the particular power.*
6. *Assurance to the wider public of the legitimacy, openness and accessibility of the exercise of the power – an aspect of accountability.”*

The Court went on to observe that where the law requires reasons to be given for a decision:

“The authorities make it clear that it is not enough simply to state a conclusion in the words of the empowering statute; the reasons must be proper, adequate ones dealing with the point in contention”.

A person in respect of whom a decision is made has the right to request a statement of reasons for the decision under section 23 of the Official Information Act 1982. This section provides a code for disclosure of information in respect of decisions or recommendations affecting individuals:

“23 Right of access by person to reasons for decisions affecting that person

(1) ...where a Department or Minister of the Crown or organisation makes ... a decision or recommendation in respect of any person ... in his or its personal capacity, that person has the right to and shall, on request made within a reasonable time of the making of the decision or recommendation, be given a written statement of—

- (a) The findings on material issues of fact; and*
- (b) ...a reference to the information on which the findings were based; and*
- (c) The reasons for the decision or recommendation.”*

Requests for a statement of reasons are often made by persons who feel aggrieved or concerned at a decision or recommendation that affects them personally. Section 23 provides such persons with a right to request the reasons for that decision, although this right is subject to certain protected interests in the Act. An Ombudsman may investigate whether a statement of reasons given under section 23 is an accurate reflection of the factors taken into account in reaching the decision and the findings made in respect of them.

While there may be no obligation to provide reasons where a request is not made by the person concerned and there is no statutory provision specifically requiring reasons to be given, it is nevertheless a matter of good administrative practice to give reasons unless doing so would prejudice interests that are protected by law. Even if reasons are not given to the person concerned, it is still important for departments to ensure that reasons are recorded, as a means of ensuring that all relevant factors have been taken into account and that the decision is soundly based. Recording reasons at the time is also of assistance if a request is later made by the person concerned for a statement of reasons, or if the decision is challenged.

Under section 22 of the Ombudsmen Act 1975, an Ombudsman may form the opinion that reasons should have been given for a decision made in the exercise of a discretionary power. On forming such an opinion, the Ombudsman may make such recommendation as he or she thinks fit, including that the decision be reconsidered, or that reasons for the decision be given.

BEVERLEY WAKEM, NEW OMBUDSMAN

Beverley Wakem became the new Ombudsman on 1 March 2005.

She graduated from Victoria University with a BA in English and History, and completed a Master's degree in Communications from the University of Kentucky in 1973. She was awarded a post graduate research award from the National Association of Broadcasters in the United States.

Her career in broadcasting began in 1963 when she became a public affairs producer for radio and, later, for television. Her career culminated in her appointment as Chief Executive of Radio New Zealand in 1984 - a post she held until 1991 - during which period she was also President of the Asia Pacific Broadcasting Union.



In 1991, she was appointed Commercial director for Wrightson Ltd, then a fully-owned subsidiary of Fletcher Challenge Ltd, and in 1992 became General Manager, Human Resources and Corporate Affairs.

She was appointed by the Government to the then Higher Salaries Commission (now the Remuneration Authority) in September, 1997, and reappointed in 2001 and again in 2004.

Beverley has been chairman of the Insurance & Savings Ombudsman Commission, chairman of the Employee Retirement Plan (a sub-plan of the Global Retirement Trust), a director of Team Talk Ltd and chairman of LCoNZ Ltd, but relinquished these appointments upon becoming an Ombudsman.

Actively involved in the community, she is currently President of the Rotary Club of Wellington.

She was awarded a CBE in 1990 for services to broadcasting and the community, and was also awarded the 1990 Commemoration Medal. She was made a Paul Harris Fellow by Rotary in 2002 and a Hunter Fellow of Victoria University in 2004.

Own Motion investigation

On 22 December 2004 the Ombudsmen jointly announced that they had decided to undertake an investigation of their own motion of the Department of Corrections' current practices and procedures with regard to the detention and treatment of prison inmates. The intent is not to re-assess individual historical complaints by inmates, but to investigate the present processes of the Department.

The investigation is progressing, and as an early step a wide variety of individuals and bodies have been specifically invited to provide input on any subject areas which they feel the Ombudsmen could usefully consider. This input was requested by mid-March, although it is hoped that the Ombudsmen will be able to accept new submissions until mid-April. The Ombudsmen consider that it is essential that by then the full scope of the investigation be defined.

It is intended to complete the investigation by the end of 2005.

Donations and the OIA

Privacy considerations may justify withholding the reasons - sought under the Official Information Act (OIA) - for a donation.

A newspaper complained to the Ombudsman under the OIA about the refusal of a District Health Board to give certain information about a substantial donation to it. Through its own sources the newspaper had learned and published the name of the donor, but wished to know the objects of the donation.

The newspaper had not had the consent of the donor to identify him. He was very concerned about this and was adamant about not having any further publicity. The board honoured this wish and considered it had "good reason" to do so in terms of section 9(2)(a) of the OIA - the protection of the donor's privacy.

The Ombudsman agreed that the donor's privacy should not be compromised further by revealing the objects of the gift. Privacy was not outweighed by other considerations to make it desirable, in the public interest, to publish the information. He also accepted the validity of the board's opinion that future donations from the same donor and other donors could be jeopardised if there were any further publicity.

The Ombudsman acknowledged there was a public interest in ensuring that donations were correctly used by the board, and that it was publicly accountable for the use of such monies. He recommended and the board released a public statement that it would use the donation and all donations in accordance with the objects agreed between it and donors.

If improprieties were suspected about the use of the gift then that was a matter that could be investigated by the Auditor General, who audited the board's accounts.

Shifting prison inmates

Penal Institutions Regulations require that inmates be informed of their impending transfer at least seven days in advance so there is a reasonable chance for their families to be advised of their change of circumstances.

However, there are provisions for this requirement to be waived - such as in the case of a "muster blowout" or in order to maintain or restore the security and order of the prison.

In a recent case, an inmate was transferred without the required notice, on the grounds that he was regarded as a threat to the institution. He was considered influential with the other inmates and there had been an incident where he acted in an "abrupt manner" towards staff at the receiving prison.

On being asked to investigate, the Ombudsman found there was no documentation on his file which confirmed this behaviour. The Ombudsman concluded that the prison had acted unreasonably in not giving the inmate seven days notice of the transfer.

For this notice to be waived it was considered a threshold had to be reached, and that the inmate had not reached it. He had not been charged with any misconduct offence and, in fact, his security rating had been lowered at the receiving prison.

For the waiver to apply, some imminent and real risk to order in the prison was required, which could not be dealt with by any other provisions that were available to segregate the inmate.

Release subject to conditions resolves urgent OIA request

Where urgent requests are made under the OIA, it is important that both requester and agency are clear about the reasons for urgency so that all options for release under the Act can be considered.

In a recent investigation, the complainant, a news media organisation, sought an urgent investigation and review of a department's refusal to make available a particular report it had commissioned. The complainant needed the information to assist in making submissions to a Select Committee and had been given a strict deadline. The department refused the request on the basis that the report was currently being edited. The anticipated release date was after the deadline for submissions to the Select Committee. The request for an Ombudsman's urgent investigation and review was received three days before the Select Committee deadline. Notwithstanding the short time frame, an urgent investigation was commenced.

The reason for urgency, namely to enable informed submissions to a Select Committee on a matter of considerable public interest, accords with the stated purpose in section 4(a)(i) of the Official Information Act of making information available to enable the more effective participation by the people of New Zealand in the making of laws and policies.

Following discussions with the agency, the complaint was resolved by release of the report subject to the condition that it was used only for the purpose of submissions to the Select Committee and not used in any other way that would disclose its contents before its public release five days later. The complainant was satisfied with the proposed resolution and the information was released in time for the submissions to be completed within the Select Committee deadline. The whole investigation process took less than 72 hours to achieve satisfactory disclosure.