

Volume 11, Issue 2. July 2005

ISSN 1173-5376

Editorial:

An Ombudsman's function under the Ombudsmen Act

The width of an Ombudsman's function under the Ombudsmen Act is often misunderstood. Shorthand descriptions, such as "*an Ombudsman is only concerned with administrative process and not the content or outcome of a decision*" can be misleading.

Under the Ombudsmen Act, an Ombudsman may investigate any decision, recommendation, act or omission by any agency named in the Act (or by any officer or employee of any agency) if the action complained about relates to a matter of administration and affects any person in their personal capacity.

In order to sustain a complaint, an Ombudsman must, after an investigation, be of the opinion that:

- (a) the decision, recommendation, act, or omission at issue:
 - appears to have been contrary to law;
 - was unreasonable, unjust, oppressive, or improperly discriminatory;
 - was based on a mistake of law or fact; or
 - was wrong; or
- (b) a discretionary power has been exercised for an improper purpose or on irrelevant grounds or reasons should have been given for a decision made in exercising a discretionary power.

Where an Ombudsman forms such an opinion, an Ombudsman may make any recommendation he or she considers appropriate.

When investigating a complaint, an Ombudsman will be seeking to determine how and why the action complained of was taken. In other words, an Ombudsman will be considering the "administrative process" followed by the decision-maker. However, although an Ombudsman does not have the power to exercise the functions of the original decision-maker, this does not mean that an Ombudsman is excluded from also considering the outcome or decision made as a result of an administrative process. Rather, an Ombudsman will consider any outcome or decision in light of how it was reached and whether, in the particular circumstances of the case, it is open to criticism.

For example, even if the administrative process followed by the decision-maker was fair, if the decision reached at the end of that process is inconsistent with the facts or any legal requirements, a complaint may be sustained on this basis. In addition, if an Ombudsman concludes that the decision in question was not reasonably open to the decision-maker, or the decision-maker has not acted in conformity with the standards reasonably expected of such an office holder, a complaint may also be sustained on this basis.

In short, an Ombudsman's jurisdiction under the Ombudsmen Act is very wide.



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The privacy interests of deceased people

DECEASED PEOPLE CAN have privacy interests that need protection under the Official Information Act (OIA) but, over the course of time, those privacy interests may well diminish. When assessing privacy concerns as they relate to deceased people, each case must be considered on its own merits.

In a recent case, a complaint was made about a refusal by the Department of Labour's Immigration Service to release to the complainant a copy of her father's immigration file, on privacy grounds. Her father had died during the 1960s, and she was seeking information about his immigration history to allow her to apply for citizenship in another country.

Section 9(2)(a) of the OIA provides that, subject to any overriding public interest, there is good reason to withhold information if it is necessary to "*protect the privacy of natural persons, including that of deceased natural persons*".

The department agreed with the Ombudsman's initial indication that, given that the complainant's father had died so long ago, it may no longer be necessary to withhold the information from his daughter to protect his privacy.

It also agreed with the Ombudsman's indication that there may be a public interest in the release of historical information about family members that would assist New Zealanders in pursuing their rights to apply for citizenship in other countries.

Accordingly, the department decided to release the information. The complainant was then able to make her application for citizenship, and also said she had found the information about her father, which she had not known previously, to be valuable in itself.

How information may become "official information"

INFORMATION THAT IS not "official information" within the meaning of the Official Information Act (OIA) may become "official information" if it is used by an agency holding it.

The Refugee Status Appeals Authority (RSAA) asked the Department of Labour to obtain information about a person claiming refugee status. The department, acting on behalf of the RSAA, obtained the information through the New Zealand Police and provided it to the RSAA. The department did not retain a copy of the information.

A request was subsequently made to the Police for the information at issue. The Police transferred the request to the department along with a copy of the information so that the department could reply to the request.

Under the OIA, official information does not include information that is held by a department solely as an agent for a third party not subject to the OIA. The department advised the requester that it held the information at issue solely as an agent for the RSAA, which is not subject to the OIA. The department explained that the information was not "official information" for the purposes of the Act and refused the request on the basis that it did not hold the information and had no grounds for believing that the information was held by another agency subject to the OIA (s18(g) OIA).

The requester asked the Ombudsman to review the decision.

During the course of the investigation, it became apparent that the Police had also provided the information to another agency subject to the OIA for its own purposes. Because of this, it could not be said that the Police held the information solely as an agent of the RSAA. The Ombudsman was therefore of the view that the information held by the Police was official information and its character did not change when it came into the possession of the department.

As the Police had transferred the OIA request to the department and provided the department with a copy of the information so it could answer the request, the department held the information for that purpose. In replying to the request, the department was not acting as an agent of the RSAA and could not reasonably claim to be holding the information solely on the RSAA's behalf.

Having considered the information, the Ombudsman formed the view that there was no good reason under the OIA to withhold it. While the department had reservations about the Ombudsman's view, it released the information.

“Consultation” does not amount to “substantial collation and research”

UNDER THE Official Information Act (OIA), the need to consult with various agencies before making a decision on a request for official information does not provide a basis for refusing that request on the grounds that it involves substantial collation or research.

A request was made to a Government Minister under the OIA for 20 documents. These were identified in the request by title, date and reference number.

The request was refused under s18(f) of the OIA, on the basis that making the information available would “involve substantial collation or research”.

It became apparent during the course of the Ombudsman’s investigation that the difficulty in responding to the request did not relate to the amount of work involved in physically collating the information at issue. Rather, the difficulty related to the amount of consultation necessary in order to make a decision on the request. A number of agencies had been involved in preparing the reports at issue, and each agency would have had to be consulted about the request.

The OIA recognises that, in some cases, it will be necessary for a holder of information

to consult with other agencies before making a decision on a request. Under s15A of the OIA, the time limits for responding to information requests can be extended if “*consultations necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the original time limit*”. Any extension must be for a reasonable period of time, having regard to the circumstances.

In this case, the Ombudsman formed the view that s18(f) of the OIA did not provide a basis for refusing the request because making the information available would not involve “substantial collation or research”. However, if a lengthy consultation process were necessary to make a decision on the request, it would be appropriate to extend the time period for responding to the request.

The Minister agreed to reconsider the request, but advised the requester that he was extending by three and a half months the time limit for making a fresh decision on the request. The requester was advised that it was open to her to list the documents in priority order and to ask the Minister to disclose each document as the necessary consultations were completed. The complaint was resolved on this basis.

Ombudsmen jurisdiction over Crown entities

THE RECENT ENACTMENT of the Crown Entities Act 2004 (CEA) has added a number of organisations to the Ombudsmen’s jurisdiction under the Ombudsmen Act (OA) and the Official Information Act (OIA). This broadening of jurisdiction may not be widely known yet.

Under s131 of the CEA, all Crown entities (including any subsidiaries controlled by Crown entities) are now subject to the Ombudsmen’s jurisdiction under the OA.

As a result, any Crown entity or subsidiary which was not previously subject to the OA now is. The only exception to this is the Police Complaints Authority.

As well, any Crown entity or subsidiary not previously subject to the OIA now is. However, if a Crown entity is a Tribunal performing judicial functions, it will not be so subject in relation to those judicial functions.

The various Crown entities that are now subject to the Ombudsmen’s jurisdiction include - the Accounting Standards Review Board, the Alcohol Advisory Council of New Zealand, the Broadcasting Standards Authority, the Commerce Commission, the Health Research Council of New Zealand, the Law Commission, the Mental Health Commission, the New Zealand Film Commission, the Privacy Commissioner, the Securities Commission, the Takeovers Panel, Te Reo Whakapuaki Iirangi (the Maori Broadcasting Funding Agency) and any current, or future, subsidiaries of Crown entities.

SUSPENSION AND EXPULSION FROM SCHOOLS

RECENT MEDIA COMMENTS have raised the question of creating an independent tribunal for school students to have disciplinary hearings reviewed. School boards of trustees have been subject to the Ombudsmen Act since they were first established by the Education Act 1989, and Ombudsmen have been investigating complaints about suspensions and expulsions from schools as they have arisen ever since.

A major focus of these investigations has been whether a particular board has acted in a manner which is procedurally fair - that is, whether the principles of natural justice have been adhered to.

If they have, the question becomes one of whether the decision has been made on the facts and applicable law and whether it appears to be appropriate in the circumstances.

Where an Ombudsman forms the opinion that a board's decision was, in any way, flawed, an appropriate recommendation may be made, where necessary. An Ombudsman's conclusion on a complaint will be based on the facts of that individual case. Particular attention will be given to due process and natural justice.

While there is no legal obligation on a school board of trustees to accept an Ombudsman's recommendation, in most cases they do. In the rare event that an Ombudsman's recommendation is not accepted, an Ombudsman can report to Parliament on the matter.

References to such investigations and the part played by Ombudsmen in encouraging appropriate procedural and (where relevant) legislative changes have been recorded frequently in the Ombudsmen's annual report to Parliament, particularly in the years 1993 to 2000. For example, the 1995 annual report records:

"The difficulties which Principals and Boards of Trustees have in meeting the statutory requirements of the Education Act ... led to the preparation by

the Chief Ombudsman of draft guidelines setting out the steps which the legislation, including the interpretation of the High Court in M&R v Palmerston North Boys' High School, requires Principals and Boards of Trustees to follow. The draft was returned to the Ministry of Education for comment. The Ministry has advised the draft will be incorporated into a set of guidelines it is finalising for use by all Principals and Boards of Trustees."

The 1996 annual report, which records that 25 complaints about suspensions or expulsions were received, further explains:

"Resort to an Ombudsman results in an independent assessment of the facts and objective recommendations to address the concerns which the investigation reveals without involving the school or parents in time-consuming and expensive legal proceedings. The likely consequences for schools not following an Ombudsman's recommendations following independent investigation of the facts, is the prospect of Court proceedings being brought by the dissatisfied parent. As noted by Williams J in Maddever v Umawera School Board [1993] 2 NZLR 478 at 503, when discussing the respective merits of judicial review proceedings and recourse to an Ombudsman, 'There is a strong argument for saying that it (recourse to an Ombudsman) is a much preferable remedy in many cases, even though an Ombudsman has the power only to report and comment....' The technical legal procedures for judicial review are a cumbersome way of dealing with issues of the kind which arose in this case, which can be more effectively investigated after complaint to the Ombudsman."

While the Court decision referred to was not concerned with a suspension or expulsion, the comments illustrate that an Ombudsman's investigation was accepted by the Court as providing an effective remedy, notwithstanding that an Ombudsman is not strictly an appellate body with authority to substitute their decision for that of a board.