

**Editorial:**

## **The Public Records Act**

Complaints that government organisations have destroyed or lost official information have always been capable of investigation by the Ombudsmen under the Ombudsmen Act. In such cases, the issues under consideration have included the reasonableness of an organisation's decision to destroy particular information and the reasonableness of any procedures or systems that the organisation may have had in place to ensure that adequate records were kept and maintained. However, expectations about the standards which government organisations should apply to document retention and management issues varied.

With the coming into force in April 2005 of the Public Records Act (PRA), expectations about the standards which government organisations should apply to document retention and management will change. The PRA introduces two key duties that government organisations must adhere to, namely:

- all government organisations must create and maintain full and accurate records of their affairs in accordance with normal, prudent business practice and these records must be accessible over time (s18 PRA); and
- government organisations must not dispose of public records without the authority of the Chief Archivist (s19 PRA).

The PRA also enables the Chief Archivist to issue mandatory record-keeping standards (s27 PRA). The Chief Archivist has the power to inspect certain public records and to view the systems which organisations have in place for maintaining public records. From 2010, independent audits of record-keeping practices must be carried out in government organisations (s33 PRA) and the Chief Archivist is required to report to Parliament on the state of record-keeping within public offices (s32 PRA).

In addition, a failure to meet the standards set by the Chief Archivist may also be a matter which is capable of investigation by the Ombudsmen under the Ombudsmen Act.

Any procedures or guidelines for better administration must be underpinned by a commitment to good record keeping. The PRA implicitly reflects the understanding that a failure to create and maintain good records will make good administration and decision making more difficult. Equally, in the Official Information Act context, the key purposes of greater accountability and public participation in the making and administration of laws and policies are dependent on accurate and accessible records.

While the PRA will present challenges to government organisations, particularly with respect to electronically held information, good government and protection of the rights of individuals requires those challenges to be met.



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## Duty to retain information for a reasonable time

Under s23 of the Official Information Act (OIA), a person is entitled to request, as *of right*, a statement of reasons, given in writing, for any decision made about them *within a reasonable time* of the decision being made.

In order for an agency to fulfil its obligations under s23, sufficient information must be retained to enable a statement of reasons to be formulated a reasonable time after a decision is made. Failure to retain sufficient information may be a matter which is capable of investigation under the Ombudsman Act (OA).

A requester sought information from the Ministry of Justice about why his application for appointment to a statutory board had been unsuccessful. The information at issue included a copy of his short-listing notes.

The Ministry replied that the short-listing notes had been destroyed on the same day as the requester was advised his application had been unsuccessful.

The Ministry explained that notes were destroyed in accordance with Principle 9 of the Privacy Act 1993: *"An agency that holds personal information shall not keep that information for longer than is required for the purposes for which the information may lawfully be used."*

An explanation of the appointment process was provided by the Ministry to the requester, but it said that without the short-listing notes it was unable to provide a more detailed explanation as to why the requester's application had been unsuccessful.

The requester complained to the Ombudsman about the Ministry's response. The Ombudsman decided, under the OA, to investigate the Ministry's decision to destroy the short-listing notes.

The Ombudsman noted that an organisation had a duty to retain sufficient information for a reasonable time after a decision was made to enable the formulation of a statement of reasons, and that such a duty would appear to be compatible with Principle 9 of the Privacy Act, because one purpose for which personal information may lawfully be used is the provision of a statement of reasons under s23 of the OIA.

The Ombudsman formed the view that the destruction of the short-listing notes had undermined the Ministry's ability to fulfil its obligations under s23 and that the Ministry was wrong in asserting that the destruction of the information had been in accordance with Principle 9.

The Ministry accepted the Ombudsman's view and plans to amend its operating procedures.

### Maintenance of the law and the OIA

If disclosure of information would be likely to prejudice the maintenance of the law - including the prevention, investigation and detection of offences and the right to a fair trial - s6(c) of the OIA provides good reason to withhold that information.

Most cases involving s6(c) are likely to focus on criminal and law enforcement matters, but s6(c) is not limited to these areas of the law. It can also apply to civil and statute law.

For example, a request was made for information generated by the Ministry of Economic Development following the decision by the Minister of Commerce to invoke the declaration process of s36D of the Securities Market Act 1998 in relation to an unregistered securities market.

The information sought was a draft summary of the major arguments made by submitters for and against the Minister's proposal to declare the market in question subject to the Act, and was largely personal information about the requester. The information was intended to form the basis of the Ministry's report to the Minister regarding the exercise of the declaration power.

It was withheld under s6(c) to protect the robustness of the relevant statutory process and thereby avoid prejudice to the maintenance of the law.

The Ombudsman was satisfied that it was crucial, at that particular stage of the statutory process, for officials to conduct their analysis of the submissions in private.

Opening up the deliberative process would likely inhibit the production of robust advice to the Minister, with the net result being that the quality of decisions would suffer, as would the effectiveness of the law relating to the regulation of financial markets.

In these circumstances, the Ombudsman formed the view that s6(c) of the OIA provided good reason to withhold the information.

## **Suspension of surviving spouse's pension on remarriage**

Occasionally, Ombudsman enquiries may bring to light a (perhaps) inadvertent anomaly that needs to be rectified.

A woman wrote to the Ombudsman that she was the surviving spouse of a contributor to the National Provident Fund (NPF) pension scheme. During the 1980s the NPF scheme stopped pensions payable to surviving spouses if the spouse remarried.

She explained that her husband had died in the early 1980s and she had remarried three years later. She had notified the NPF of her remarriage and was advised that her entitlement ceased from that point in time.

The complainant thought this decision was unfair and improperly discriminatory. In 2001, she also learned that legislation had been passed removing a similar disentitling provision in respect of the Government Superannuation Fund.

Over the years, she raised her concerns with a number of people. She was advised that there had been no change to the NPF rules as they affected her. As a last resort, she wrote to the Ombudsmen.

The NPF is subject to the Ombudsmen's jurisdiction under the Ombudsmen Act. The Ombudsman therefore raised the complaint with the NPF.

The NPF said that, in about 1990, its scheme had also been amended to remove the provision on suspending a surviving spouse's entitlements on remarriage. Accordingly, surviving spouses who remarried after 1990 did not lose their entitlements.

It explained that, because it had been unable to identify the spouses who had been suspended before this date, it could only deal with claims from spouses on a case-by-case basis when they raised the matter.

In addition, the NPF also said that it had received legal advice to the effect that the amendment to the scheme's rules did not affect the rights of members that had already "crystallised" or been determined.

On reviewing the complaint the NPF decided, without prejudice, to settle the claim and reinstate the complainant's pension, and the complaint was resolved on this basis.

## **Inmate placements should be consistent with security classification**

The Department of Corrections' Security Classification system states that inmates must be classified at the lowest classification level at which they can be managed safely and securely.

Once classified, inmates should be placed in the least restrictive facility and regime that is consistent with their security classification.

A complaint was received from an inmate who had been classified as low-medium security. He had been held for four months in a unit that catered primarily for high-medium and maximum security inmates.

The department said that, as a result of a shortage of segregated beds, it had not been possible to move the inmate to a less restrictive facility. It also said that it was not always possible to apply inmate-placement policies because of the limited bed space available.

Having reviewed inmate numbers and security classifications at the prison in question, the Ombudsman noted that a considerable number of high-medium security inmates appeared to be placed in a less restrictive division of the prison.

At the same time, low-medium inmates were also being held in a more secure or restrictive division than their security classification seemed to warrant.

The Ombudsman also noted that the inmate in question had been classified at 9 points, which was only just above the normal minimum security classification of 0-8 points.

The complaint was sustained. The Ombudsman accepted that, due to muster emergencies and one-off incidents, it might be necessary to place low-medium inmates in more restrictive regimes for a short period of time, but believed that four months was excessive.

As the inmate had already been transferred to a less restrictive division by this time, it was not necessary for the Ombudsman to make a recommendation.

## How requesters intend to use information – privacy implications

When considering whether it is necessary to withhold information under s9(2)(a) of the OIA to protect privacy, one of the first questions to ask is “does a privacy interest attach to this information?” Factors such as the nature of the information and what it reveals about the person(s) to whom it relates are relevant. How a requester may intend to use information sought under the OIA does not, in itself, determine whether section 9(2)(a) applies.

A complaint was made about a refusal by the New Zealand Film Commission (NZFC) to release certain information relating to a film made in the 1980s. The NZFC was aware that the requester intended to publish information about the film and its makers.

The NZFC consulted one of the film-makers, who objected to disclosure on the grounds that publication of the information would prejudice his privacy. On those grounds, the request was refused under s9(2)(a).

However, the Ombudsman formed the view that the requester’s intention to publish the information did not, in itself, mean that s9(2)(a) applied.

Instead, it was the nature and content of the specific information at issue that was important and, in particular, whether there were any privacy interests attaching to the information and whether it was necessary to withhold the information in order to protect those privacy interests.

The Ombudsman was of the view that it was not necessary to withhold all the information to protect the privacy interests of the film-makers and others. Much of the information related to aspects of the film’s production rather than specific individuals personally. The information was also years old and any privacy interests were likely to have diminished with time. Although the views of the film-maker were relevant, the fact that he did not consent to disclosure did not, necessarily, mean that the information should be withheld to protect his privacy.

The Ombudsman recommended the information be disclosed, subject to certain deletions, and the NZFC complied.

## Confidentiality of interview transcripts – a two-stage test

The fact that information is subject to an obligation of confidence does not, in itself, provide grounds for withholding that information under the Official Information Act (OIA).

Section 9(2)(ba)(i) of the OIA may apply to information that is confidential but, before that section can be said to apply, an agency must be satisfied that:

- the information is subject to an obligation of confidence; and
- making the information available “*would be likely to prejudice the supply of similar information, or information from the same sources, and it is in the public interest that such information should continue to be supplied*”.

In a recent case, a request was made to the Maritime Safety Authority (MSA) for copies of transcripts of taped interviews conducted by the Transport Accident Investigation Commission (TAIC) in respect of an accident which had occurred in 1996. The MSA refused the request under s9(2)(ba)(i) of the OIA.

The Ombudsman accepted that the transcripts were subject to an obligation of confidence because the interviewees had understood that the TAIC would keep their statements confidential.

The second issue - whether disclosure of the transcripts would be likely to prejudice the supply of similar information, or information from the same source, in the future - was more complicated.

Certain provisions of the TAIC Act 1990 were relevant; in particular, s14R of the Act provides that the OIA does not apply to recordings or transcripts of interviews conducted by the TAIC during investigations. However, s14R did not come into force until September 1999 and does not apply to accidents that occurred before then.

In these circumstances, the Ombudsman accepted that s14R of the TAIC Act placed future transcripts of TAIC investigation interviews beyond the reach of the OIA.

Consequently, because the TAIC Act now protects such transcripts, the Ombudsman was of the view that it was not necessary to withhold the transcripts at issue in order to protect the supply of similar information in the future. As the second part of the test under s9(2)(ba)(i) was not made out, that section did not apply.

The MSA released the transcripts.