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Editorial:

The Ombudsmen Act and the Disclosure of Information about Third Parties

On occasions, government agencies will receive requests, either under the official information legislation or the Privacy Act, for information relating to third parties. For example, a requester may ask, under the Privacy Act, for a copy of their file which also contains information about other people. Or a requester may seek, under the Official Information Act, information relating to the commercial activities of a particular person or business.

The official information legislation and the Privacy Act provide grounds to withhold information relating to third parties in certain circumstances (for example, see sections 9(2)(a) or 9(2)(b)(ii) of the Official Information Act). However, in some cases, an agency may, mistakenly, disclose information about a third party which should have been withheld. Such a situation could arise in two instances:

- an agency decides to withhold the information at issue but, through an administrative error, some of the information is, inadvertently, disclosed; or

- an agency incorrectly decides that it is not necessary to withhold the information in order to protect the interests of the third party involved.

Where information is disclosed, in good faith, pursuant to the Official Information Act, section 48 provides that no proceedings, civil or criminal, will lie against the Crown or any other person in respect of the making available of that information or for any consequences that follow from the making available of that information. A similar protection is available in section 41 of the Local Government Official Information and Meetings Act and section 115 of the Privacy Act.

However, the protection afforded by these sections is only in respect of civil and criminal proceedings and does not affect an individual's rights of review under the Ombudsmen Act. Accordingly, a person affected by an agency's failure to withhold certain information could ask an Ombudsman to investigate, under the Ombudsmen Act, the reasonableness of the agency's actions.

An example of such a complaint arose recently. In that case, the name of an informant was inadvertently disclosed to the person who she had made allegations about. Although there had been a mistaken disclosure of information, the department involved had acted in good faith throughout. As a result, the Privacy Commissioner found that there had been no breach of the informant's privacy and that the protections afforded by section 115 of the Privacy Act applied.

However, the informant also complained to the Ombudsman about the accidental disclosure of her name. The Ombudsman was of the view that the Privacy Commissioner's conclusions did not preclude him from considering the informant's complaint under the Ombudsmen Act.

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After investigating the matter, the Ombudsman formed the view that:

- the department's failure to delete the informant's name was wrong; and
- it was unreasonable for the informant to have to bear certain costs which resulted from the disclosure of her name to the alleged offender. In particular, the informant explained that she had incurred legal costs in taking out a restraining order against the alleged offender following verbal abuse and threatening behaviour after the disclosure occurred.

The Ombudsman formed the view that the department should make an ex-gratia payment to the informant to cover her legal costs and to recognise the distress she had suffered as a result of the accidental disclosure of her name.

Such cases illustrate the importance of ensuring that agencies have robust systems in place for:

- assessing whether there is good reason to withhold third party information; and
- ensuring that, once those decisions have been made, information which should be withheld is not inadvertently disclosed.

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Chief Ombudsman

Beverley Wakem
Ombudsman

Help for East Timor

DURING January 2006, former Ombudsman Mel Smith and Office of the Ombudsmen general manager Peter Brocklehurst travelled to Timor-Leste (East Timor) under the sponsorship of the United Nations Human Rights Commission and the United States Agency for International Development to provide training and assistance to the newly established Office of the Provedor (Ombudsman) there.

The Office of Provedor has been given a very wide jurisdiction by the Timor-Leste government which extends to matters of mal-administration, anti-corruption and human rights.

Amongst many significant challenges facing the Provedor's office will be the recruiting of suitably qualified staff. The country's population is approximately 900,000 persons, mostly living in relatively remote provinces, with only 100,000 living in the capital Dili.

The New Zealand Ombudsmen expect to continue providing training and support to the Provedor's office for the medium-term future.

Insert

In this OQR issue we have published as an insert an updated checklist for processing official information requests (under both OIA and LGOIMA). We hope this will assist both requesters and holders of official information. The new checklist replaces the checklist published in the OQR (Vol 4, Issue 1) in March 1998.

Unreasonable refusal to consider a Work Permit request under section 35A application

WHEN considering applications under section 35A of the Immigration Act, the Department of Labour Workforce should not be resistant to granting a permit simply because no "exceptional" or "humanitarian" circumstances exist.

A family that arrived in New Zealand was granted visitors' permits for a period of time. Within that period, the family's father instructed a lawyer to lodge an application for a work permit but it was lodged a day after the family's permits had expired.

The lawyer explained to the Department that the application had been submitted late because he had been appearing in Court and the delay was not the fault of the family.

The Department treated the application as a request under section 35A of the Immigration Act, which provides that the Minister of Immigration may grant a permit of any type to a person who:

- is in New Zealand; and
- is required to hold a permit to be in New Zealand but does not hold a permit; and
- is not a person in respect of whom a deportation or removal order is in force.

Some seven months after the request was tendered, the Department advised the family that it had been declined.

After correspondence with the Department and the Associate Minister of Immigration, the family complained to the Ombudsman that it was unreasonable of the Department not to accept the lawyer's explanation that he had been responsible for the late submission.

The investigation revealed that at the time of considering the request, the Department appeared to have relied on section 35A which provides that there is no obligation to consider such requests from applicants who are unlawfully in New Zealand.

However, on reviewing the matter, the Department acknowledged that officers should not be resistant to the grant of a permit under section 35A simply because no "exceptional" or "humanitarian" circumstances exist.

The Department further acknowledged that it was apparent that the decision to refuse to consider the request was unreasonable given:

- the length of time between the expiry of the family's permits and the decision; and
- the lawyer's explanation as to why the application had been submitted one day late.

The Department offered to assess the family's application again. The family would have to show that it met the relevant requirements under the legislation but the Department agreed to waive any fees associated with the process.

The family accepted the Department's offer and the complaint was resolved on that basis.

The use of agents to respond to requests

SECTION 14 of the Official Information Act (OIA) requires the recipient of an official information request to transfer that request to another agency in certain circumstances.

However, the fact that transfers are required where section 14 of the OIA applies does not preclude an agency from appointing someone else to respond to an official information request on its behalf.

For example, an agency might decide it should respond to a request through its solicitor. Alternatively, where overlapping requests are made to several agencies and some, or all, of them hold the same information, they may decide to appoint a lead agency, or a third party, to respond to the requests as agent for them all.

In such cases, any complaints under the OIA about the responses provided are against each of the individual agencies that received the requests and not against the agent that they may have appointed to respond to the requests.

Is the information held?

IT is important that information which is the subject of an official information request be identified before a decision is made on that request.

A MP asked the Ombudsman to investigate the decision of three government departments to refuse her requests for information about Budget initiatives which had been approved by the Cabinet before a certain date. The departments had advised the MP that they were withholding the information at issue under sections 9(2)(f)(iv), 9(2)(g)(i) and 9(2)(j) of the Official Information Act (OIA).

During the course of the investigation, it became apparent to the Ombudsman that the departments did not hold any relevant information because the Cabinet had not approved any initiatives relating to their Budget bids prior to the date in question.

In these circumstances, the Ombudsman formed the view that the original requests should have been refused under section 18(g) of the OIA, on the basis that the information was not held by the departments and there were no grounds for believing it was either held by, or connected more closely with the functions of, any other agency subject to the OIA.

If a requester is advised that no information is held relevant to their request, it is open to them to make another, more refined, request.

If an agency fails to identify that no information is held and, instead, wrongly refuses the request pursuant to one of the withholding grounds in section 9(2), the requester may be denied a timely opportunity to make a fresh request.

Notify requesters of likelihood of delay in replying to official information requests

WHEN it becomes clear that an extended time limit for responding to an official information request cannot be met, it is good administrative practice for agencies to contact requesters to advise them of a further delay rather than letting deadlines pass unacknowledged.

Section 15A of the OIA provides that the maximum 20 working day time limit for responding to official information requests may be extended in certain circumstances.

Where an agency extends the time limit for responding to requests, the normal assumption is that the agency expects to respond within that extended maximum time limit. Under the OIA, only one extension is permitted.

If an agency fails to meet the extended time limit, the request is deemed to have been refused and a requester can complain to an Ombudsman on that basis.

However, extensions are, at best, an estimate. Unforeseen difficulties may arise on occasion which make it impossible to meet the extended time limit.

The experience of the Ombudsmen is that requesters often accept that an extended time limit cannot be met when they have been given early warning of the likelihood of further delay.