

Request for information held by Needs Assessment and Service Co-ordination agencies

Legislation:	Official Information Act 1982, ss 2(5), 18(g)
Agency:	Ministry of Health
Ombudsman:	Professor Ron Paterson
Case reference:	380335
Date:	October 2015

Summary

The Ministry of Health (the Ministry) partially refused a request for information on the basis that the information was held by Needs Assessment and Service Co-ordination agencies (NASCs), and NASCs are not independent contractors engaged by the Ministry for the purposes of the Official Information Act 1982 (OIA).

NASCs are organisations contracted by the Ministry to work with disabled people to identify their strengths and support needs, outline what disability support services are available, and determine their eligibility for Ministry-funded support services.

Under section 2(5) of the OIA, any information held by an independent contractor engaged by a Department, Minister of the Crown or organisation in its capacity as such contractor, is deemed to be held by the Department, Minister of the Crown or organisation.

The Ombudsman found that the basis on which the Ministry had partially refused the request was not justified, in that NASCs are independent contractors engaged by the Ministry for the purposes of the OIA.

After considering the Ombudsman's comments, the Ministry arranged for the NASCs to respond to the information request. In these circumstances, the Ombudsman did not consider it necessary to make a recommendation. This case note contains some helpful information about how the Ombudsmen interpret and apply section 2(5) of the OIA.

Background

1. A requester submitted to the National Health Board, a Ministerial appointed Board within the Ministry of Health, a request for official information held by NASCs relating to the implementation and operation of Funded Family Care, and a request for information about Funded Family Care applications. Funded Family Care is Ministry funding administered by NASCs, which enables people with disabilities to employ family/whānau to provide support.
2. The Ministry provided the requester with some of the information she had asked for but also advised that:

“As NASCs are independent agencies (contracted to the Ministry to provide various services), they are a separate agency and not covered by the Act. Further, they are not an agent of the Ministry and therefore the Ministry does not hold all copies of all of their information.”

3. The requester wrote to the Ministry, outlining a number of concerns about the information that was refused and the basis for the refusal.
4. The requester was dissatisfied with the Ministry’s response and complained to the Ombudsman. Her primary concern was the refusal to provide information held by NASCs in their capacity as contractors to the Ministry.

Investigation

5. On 26 August 2014, Ombudsman Ron Paterson notified the Ministry that he would be investigating its refusal to provide information held by NASCs on the basis that it did not deem NASCs to be independent contractors engaged by the Ministry for the purposes of the OIA.

The information at issue

6. The following information was withheld by the Ministry on the basis that it did not deem NASCs to be independent contractors for the purposes of the OIA:
 - a. all information held by NASCs relating to the implementation and operation of Funded Family Care, including any material generated by the NASCs for their own use in assessing for and implementing Funded Family Care
 - b. for each of the persons who successfully applied for Funded Family Care:
 - i. the number of unpaid support hours provided by families; and
 - ii. the number of family members identified by the NASC as available to provide support.

Section 2(5) of the OIA

7. Section 2(5) of the OIA states:

“Any information held by an independent contractor engaged by any Department or Minister of the Crown or organisation in his capacity as such contractor shall, for the purposes of this Act, be deemed to be held by the Department or Minister of the Crown or organisation.”

Comments received during investigation

8. The Ministry submitted:

“The fact that a party has a contract with a government agency does not mean that they are necessarily an independent contractor for the purposes of the OIA.”

9. The Ministry considers that in the OIA context, the term *“independent contractor”* excludes NASCs because of the nature of the services they provide, which are said to differ from the services provided to a department or Minister by independent contractors such as consultants. The Ministry submitted that it would be inconsistent with the purpose and scheme of the OIA, and the provisions of section 2, for the term *“independent contractor”* to be applied to its contracted providers.
10. The Ministry appeared to be advancing the proposition that:
- a. the nature of the services being provided can determine whether a contract for services is a contract with an independent contractor; or
 - b. information held by some independent contractors is excluded from the deeming provision in section 2(5) of the OIA.
11. The Ministry outlined a number of reasons in support of its submission that section 2(5) does not apply, including that:
- a. in the context of the OIA, independent contractors are treated like employees and, consistent with that relationship, information held by them is deemed to be held by the relevant agency;
 - b. contracted providers are not accountable in a similar manner to Ministers and officials and one of the OIA’s purposes is to promote such accountability;
 - c. the amount of information held by providers is so vast that it is inconceivable that the Ministry could be considered responsible for holding or controlling all of that information;

- d. the scheme of section 2(2) to 2(6) of the OIA is focussed on individuals and entities carrying out activities that assist or advise the agency and therefore may effectively be acting in the place of an employee;
- e. the application of the OIA (and the Ombudsmen Act 1975) to new entities requires their inclusion in the Schedules to those Acts; and
- f. contracted providers are not public offices and do not generate public records for the purposes of the Public Records Act 2005.

Application of section 2(5)

12. The Ombudsman agreed that the fact an agency has a contract with a government agency does not necessarily mean that it is an independent contractor for the purposes of the OIA. A contract with a department or Minister for the sale or purchase of a piece of land, for example, would not make the other party an independent contractor engaged by the Ministry, as no services are being provided. However, the question in this case is whether NASCs provide services for the Ministry under contract. If the contracts with NASCs are for the provision of services — and the Ombudsman’s review of a sample contract between the Ministry and a NASC demonstrated that they were — it is difficult to escape the conclusion that the relationship between the NASCs and the Ministry is that of independent contractors engaged by the Ministry.
13. Quite apart from the fact that the express wording of section 2(5) leaves no room for doubt that information held by independent contractors is deemed to be official information held by the engaging agency, the Ombudsman was not persuaded by the reasons given by the Ministry in support of the proposition that NASCs are not intended to come within section 2(5) of the OIA.
14. The Ombudsman’s comments on the Ministry’s arguments are set out below.

Nature of the relationship

15. Although some independent contractors may be treated like employees, this depends on the terms of the contract and the services provided. For example, a consultancy firm called upon to provide specialist services will not be acting in the nature of an employee and could not be treated like one. Nevertheless, such a firm is an independent contractor. Consequently, information held by the firm in that capacity is official information, not because the firm does the equivalent work of an employee, but because it has a contract to provide services to an agency subject to the OIA.

Accountability

16. Independent contractors are not accountable in a similar manner to Ministers and officials, and are not subject to either the Ombudsmen Act or the OIA. They are

accountable to the contracting agency, under the contract pursuant to which they agree to provide services. The agency itself is accountable under the OIA, and thus (pursuant to section 2(5)) the information held by the independent contractor relating to the contract with the agency is deemed to be held by the agency.

Quantity of information

17. The amount of information held or deemed to be held by an agency subject to the OIA is immaterial to the question whether that information is official information. Quantity only becomes relevant if an official information request requires substantial collation or research.
18. Only information held by NASCs in their contractual capacity is deemed to be held by the Ministry. In other words, it is the scope of the contracts that will determine the information that is deemed to be held by the Ministry, not the scope of the information held by a NASC.

Scheme of sections 2(2) to 2(6) of the OIA

19. The scheme of section 2(2) to 2(6) of the OIA is not limited to activities that assist or provide advice to agencies. Section 2(2) expressly includes unincorporated entities of whatever kind that are established for the purpose of “performing functions connected with” a department.
20. It is difficult to see how it could reasonably be argued that NASCs do not perform functions that are connected with the Ministry, given that the Ministry describes them as “*integral to the Ministry’s funded family care policy*”.

Application of the OIA to new entities

21. The application of the OIA to new entities is not relevant to the interpretation of section 2(5) of the OIA. The section simply defines certain information held by them as being deemed to be held by the Ministry. The Ministry is properly accountable for decisions made in response to requests it receives under the OIA in relation to such information.

Public Records Act 2005

22. The Public Records Act is not relevant in this context. The question is not whether information held by an independent contractor is contained in or generated as a public record, but whether information held in the capacity of an independent contractor can be requested from the Ministry under the OIA. Section 2(5) of the OIA answers that question in the affirmative.

NASCs and DHBs

23. The Ombudsman noted that some NASCs are operational arms of DHBs. These NASCs are subject to both the Ombudsmen Act 1975 and the OIA, being related companies of DHBs within the meaning of section 2(2) of the Ombudsmen Act. (DHBs and their related companies are specified in Part 2 of Schedule 1 to that Act.) Further, because DHBs and their subsidiaries are Crown entities, NASCs that are operational arms of DHBs are Crown entities, which also makes them public offices within the meaning of the Public Records Act. Accordingly, the position relating to these NASCs and other such entities differs from entities that are NASCs but not subject to the Ombudsmen Act or OIA (or public offices) in their own right.
24. If the Ministry believes the information requested from a NASC that is an operational arm of a DHB to be more closely connected with the functions of the NASC, it is required under section 14 of the OIA to transfer such OIA requests to the NASC. That, however, does not affect the status of those NASCs (and similar bodies) under section 2(5) of the OIA. It simply means that whatever information such a provider holds, whether relating to the contract or not, should be considered directly by the provider under the OIA.

Outcome

25. For the reasons outlined above, the Ombudsman formed the opinion that the Ministry was not entitled to refuse the request on the basis that the information was not held by the Ministry. He concluded that NASCs *are* independent contractors engaged by the Ministry for the purposes of section 2(5) of the OIA.
26. In response to the Ombudsman's provisional opinion, the Ministry advised the Ombudsman that it had asked individual NASCs to provide the requester with the information she requested (or in the case of NASCs that are operational arms of DHBs, transferred her request). Accordingly, the Ombudsman did not consider it necessary to make a recommendation.