|  |
| --- |
| Request for address information to assist enforcement of judgment orders |
|  |
| Legislation Official Information Act 1982, s 9(2)(a), 9(1)  Agency Department of Work and Income  Ombudsman Anand Satyanand and Sir Brian Elwood  Case number(s) W42175, W42268, W43077, W42517, W42537, W42854, W43030  Date December 2007 |

*Landlords obtained judgment orders from Courts or Tenancy Tribunal against former tenants but were unable to have them executed as current address for judgment debtors unknown— requested current address information from Department of Work and Income (now part of MSD)—information withheld to protect clients’ privacy, and future supply of information*— *public interest in maintaining the proper administration of justice and promoting respect for the law outweighed privacy interest—MSD agreed to provide address information direct to Department for Courts*

# Background

A number of landlords who were owed money due to unpaid rent or damage to rental property, sought and obtained judgment orders from the Courts or the Tenancy Tribunal against their former tenants. However, the landlords were unable to have these orders executed because they could not locate the tenants, and the then Department for Courts did not have current addresses for the tenants concerned. Staff at the Department for Courts advised the landlords (judgment creditors) that it was not part of their functions to locate the relevant addresses and that, until the Department received this information, either from the judgment creditor or from a third party, they would be unable to proceed with enforcement action.

The judgment creditors all had reason to believe that the tenants (judgment debtors) were receiving benefits from the then Department of Work and Income (DWI). Therefore, the judgment creditors came to the conclusion that DWI would hold the current address information for these judgment debtors, and they duly wrote to DWI requesting that this information be provided to them under the OIA.

DWI refused these requests in each case under section 9(2)(a) of the OIA, on the basis that the address information needed to be withheld to protect the privacy of the individuals concerned. In some cases, sections 9(2)(ba)(i) and (ii) were also advanced as an alternative reason for refusal on the basis that the individuals had supplied details of their current addresses to DWI subject to an obligation of confidence, and disclosure would prejudice the integrity of the address information DWI receives in the future. It would also result in ‘a diminished ability to meet, and heightened public concern about, the Department’s obligations under the Information Privacy Principles’. Certain requesters were also advised that ‘[DWI has] made a policy decision not to disclose to debt collectors/landlords’.

# Investigation

First, the Ombudsman clarified the circumstances surrounding the requests themselves. The requesters advised that the sole purpose for requesting the address information was so that they could pass it on to the Department for Courts to facilitate enforcement of the judgment order. They accepted that use of the address information for other purposes might raise valid concerns about disclosure and advised the Ombudsman that, if DWI provided the address information direct to the Department for Courts (for the sole purpose of enforcing the specific judgment order in their favour), they would consider this sufficient to resolve their respective complaints.

Secondly, there were potentially hundreds of cases of requests by judgment creditors for the current address information of those judgment debtors who were believed to be clients of DWI. Since these cases were likely to raise virtually identical issues under the OIA, the Ombudsman considered it appropriate to restrict his investigation to a fixed number of cases that were representative of the larger number of similar refusals that had taken place. These representative cases all involved Tenancy Tribunal orders. Subsequent complainants were advised that they would be apprised of the outcome of this current investigation upon its conclusion rather than the Ombudsman commencing separate investigations of the refusals in each case.

The Ombudsman wrote to DWI advising that he intended to investigate whether it should have refused to make available the address information requested in these representative cases. He noted DWI’s advice to certain requesters that it had a policy not to release such details to landlords or debt collectors. However, he also noted that staff from various DWI branches had taken different approaches to requests for the current addresses of certain named persons. One branch advised a requester that it was DWI’s policy ‘to provide the respondent’s address, where it is known, direct to the Court for them to arrange service’ whereas another said ‘it is the position of [DWI]…that neither the Privacy Act nor the Official Information Act require [DWI] to provide this information’. In any event, the Ombudsman explained that the OIA does not provide for blanket refusals on the basis of a ‘class’ or ‘category’ of information. Rather, each request may only be refused if there is a good reason for refusal under the Act.

DWI, in response, confirmed that it was relying on sections 9(2)(ba) and 9(2)(a) to withhold the address information.

## Section 9(2)(ba)(i)

DWI stated that, under the Social Security Act 1964 and its regulations, beneficiaries can be compelled to provide their addresses to DWI. Even where the provision of such information had not been compelled, DWI said it treated address information as being subject to an obligation of confidence. Further, DWI submitted that there is a public interest in its clients keeping the Department advised of their current address. The Ombudsman accepted these arguments.

The issue under this section therefore turned on the detriment or harm that would likely result if the confidential information were released. DWI asserted that there was a very real and likely risk that, if its clients became aware that DWI was forwarding their address details to the Department for Courts, both the future supply and the integrity of the address information DWI holds would be affected by clients using agents, false addresses or relative’s addresses, or failing to notify DWI of a change of address.

The Ombudsman noted that he was not provided with any material that supported the assertions made. In fact, the Ombudsman was aware of two DWI branch offices that had made address information available in the past on the basis that the details were needed to enforce judgment orders. Further, if the predicted prejudice to the supply of future information was valid, the Ombudsman observed that it would be reasonable to expect that this would also have occurred when DWI began disclosing address information under section 126A of the Social Security Act, to assist the enforcement of fines imposed in criminal proceedings. This did not happen. Therefore it seemed inherently unlikely to the Ombudsman that the reaction would be any different simply because the address information is disclosed to the Department for Courts for the purposes of enforcing civil judgments.

## Section 9(2)(ba)(ii)

It was also argued that disclosure would be likely to ‘otherwise damage the public interest’ in that it would result in a diminished ability to meet, and heightened public concern about, the Department’s obligations under the Information Privacy Principles.

The Ombudsman considered DWI’s obligations under the Privacy Act 1993, and noted that those contained in Information Privacy Principles 6 and 11 are subject to DWI’s obligations under the OIA. Further, sections 7(1) and 7(4) of the Privacy Act provide that any disclosure made in good faith pursuant to the OIA is not a breach of any of the other Information Privacy Principles. The Ombudsman was not satisfied that disclosure of information pursuant to the OIA would involve a diminution of DWI’s ability to meet its obligations under the Information Privacy Principles, nor that disclosure would cause any heightened public concern.

## Section 9(2)(a)

DWI’s primary concern in these cases was that releasing the address information of its clients to a third party, without the clients’ consent, would infringe their privacy.

The Ombudsman was inclined to agree that privacy interests were an issue in these cases and he duly consulted the Privacy Commissioner, as required by section 29B of the OIA when information is refused under section 9(2)(a). The Privacy Commissioner agreed there was a strong privacy interest in the address information, particularly when it had been supplied in confidence under the mandatory requirements of the social welfare legislation for one purpose, namely the administration of benefits and entitlements. As such, the Privacy Commissioner said there was an expectation that ‘it would be kept confidential and only used for the business of the Department’.

The Ombudsman then explored whether the judgment debtors in the present cases could reasonably expect that the current address information they had provided to DWI could and would be kept private in all circumstances. He noted Information Privacy Principle 11 of the Privacy Act (IPP11) generally requires agencies which hold personal information not to disclose it to third parties unless the agency holding the personal information believes on reasonable grounds that one of the exceptions in paragraphs (a) to (i) is applicable. The Ombudsman identified two paragraphs as having particular relevance, namely:

* Paragraph (e)(i), which permits disclosure where there are reasonable grounds for believing that non-compliance is necessary to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, investigation, prosecution and punishment of offences. In circumstances where a judgment order had been obtained, the Ombudsman considered it would be reasonable for the judgment creditor to expect that the order would be enforced. However, if enforcement were to be frustrated by the inability to gain access to the current address of the judgment debtor, then arguably maintenance of the law and public confidence in the judicial process would be prejudiced.
* Paragraph (e)(iv), which permits disclosure where there are reasonable grounds for believing that non-compliance is necessary for the conduct of proceedings before any Court or Tribunal (being proceedings that have commenced or are reasonably in contemplation). Section 79(1) of the District Courts Act 1947 makes it clear that the various enforcement processes available to a judgment creditor are ‘proceedings’. Given the requesters’ advice that the information could be released direct to the Department for Courts to enable enforcement of the specific judgment orders they had obtained, and given the Department for Court’s advice that no action would be taken without details of the current addresses of the judgment debtors, it may be argued that the conduct of proceedings (for enforcement of judgment orders) would effectively be halted if the address information was not made available.

After carefully considering these exceptions to IPP11, the Ombudsman noted that they were discretionary grounds for disclosure. In other words, if either exception applied, this did not automatically mean that it was not necessary to withhold the information to protect the privacy of the respective individuals. Rather, all the circumstances of the particular case must be considered.

The Ombudsman noted that the address information had been provided by the judgment debtors in confidence for one purpose, namely the administration of benefits and entitlements by DWI, and that the judgment creditors wanted this information to be supplied either to them or to another government agency for another purpose. Further, it was clear that the judgment debtors did not want the judgment creditors or the Collections Unit of the Department for Courts to be able to access their current address details.

The Privacy Commissioner commented:

…there can be little credible doubt that these individuals would not want their addresses released in this situation. Disclosing address details enables physical proximity and contact. Other family members can be involved. There may be a number of reasons for a person not wishing their address to be known.

After careful consideration, the Ombudsman accepted that it was necessary to withhold the address information requested by judgment creditors to protect the privacy of the judgment debtors. Section 9(2)(a) therefore applied to all the cases he was reviewing.

## Public interest

As the Ombudsman had accepted that section 9(2)(a) applied, he then considered whether the need to withhold the information was outweighed by any other considerations which rendered it desirable, in the public interest, to make that information available.

It was the Ombudsman’s view that ‘public interest’ is a broad term and is not limited simply to the concepts of ‘participation’ and ‘accountability’. Rather, he considered it extended to matters such as maintaining respect for the law. He noted that the judicial system and the right to have disputes adjudicated by the Courts are fundamental cornerstones of New Zealand society. Further, prejudice to the maintenance of the law is recognised by both the OIA and the Privacy Act as an interest requiring protection (sections 6(c) and 27(1)(a) of the OIA, and IPP 11(e)(i) of the Privacy Act refer). It was the Ombudsman’s view that, if disclosure would avoid a prejudice to the maintenance of the law, this was a particularly relevant public interest consideration favouring release of the requested information.

The Ombudsman then identified a number of considerations favouring disclosure in the circumstances of these cases:

* First, disclosure would allow individual judgment creditors to seek enforcement orders. Where individuals have pursued a matter through the justice system and obtained a judgment order in their favour, the Ombudsman considered it would be reasonable to expect government departments such as DWI to assist the proper enforcement of such orders rather than act in a way that hinders enforcement. In other words, if the withholding of certain address information by departments or organisations subject to the OIA effectively prevents the enforcement of judgment orders, respect for the law is likely to be undermined and this would not, in the Ombudsman’s view, be in the public interest.
* Secondly, disclosure would also preserve the integrity of the Tenancy Tribunal process under the Residential Tenancies Act 1986. It seemed to the Ombudsman that disclosure of judgment debtors’ current addresses held by DWI would not only help maintain confidence in the integrity of the judicial system as a whole, but would also preserve the integrity of the specific legislation relating to residential tenancies by enabling the enforcement of the judgment orders. Otherwise, if the address information continued to be withheld, the requesters would be prevented from achieving ‘finality…after their day in Court’. Both landlords and tenants would likely lose confidence in the processes established under the Residential Tenancies Act, and ultimately may consider pursuing their own solutions. The then Ministry of Housing agreed with this assessment. It said:

Tenancy Services encourages landlords and tenants to use the dispute resolution process that is provided under the Residential Tenancies Act. Landlords who get frustrated with the system, are likely to have reduced regard for the present legislation and processes, which are generally seen as fair and effective. There would then be a risk that landlords and tenants would pursue their own solutions. This would defeat the very purpose for which the Residential Tenancies Act was introduced. …These are obligations which have been established following due process in the judicial system. Not enforcing them runs a significant risk of reducing support for the judicial system.

One perception (which has been supported by our formal customer research) is that effective enforcement of Tenancy Tribunal decisions is seen as a major gap in the operation of the tenancy law and the Courts’ system more generally. Many landlords have argued that one way to ameliorate this deficiency would be for information held by one Government Agency to be made available to others for this limited purpose of enforcement of Court Orders. These are not isolated situations as the number of cases brought annually for arrears and other costs to the Tribunal is now in excess of 30,000....

The public interest in maintaining confidence in the judicial system by enabling enforcement outweighs the arguments which support the privacy interests of people who have been ordered to pay a debt or damages by a Court.

It was then necessary for the Ombudsman to determine the weight of these public interest considerations favouring disclosure.

The Ombudsman considered the process, under the District Courts Act, for the enforcement of orders made by the Courts and Tenancy Tribunal for the payment of money in civil proceedings. This process was compared with the procedures and remedies available under the Summary Proceedings Act 1957, for enforcement when fines are imposed by the District Court in criminal proceedings. While broadly similar, the Ombudsman found the two processes did differ in certain material aspects. Of particular note was the fact that, in the case of civil proceedings, the onus is on the judgment creditor to take action before the Court to seek enforcement and to determine which method of enforcement to pursue whereas, in the case of criminal proceedings, it is the responsibility of the Registrar to initiate enforcement action and to refer the matter to a Judge if this is unsuccessful. Further, the Summary Proceedings Act specifically contemplates the Registrar taking action to locate a fines defaulter in the criminal process, whereas it is the judgment creditor who directs the course of the civil process.

However, the Ombudsman also noted that, where a Court has ordered a defendant to pay a fine or to pay a sum of money adjudged owing to a plaintiff, disobedience of such an order constitutes contempt of court in both criminal and civil processes, which may ultimately lead to the imposition of a sentence of periodic detention without relieving the defendant from the obligation to pay the fine or judgment debt. It seemed clear to the Ombudsman that, as well as ensuring that a judgment creditor can obtain the payment which the Court has decided they are legally entitled to, a fundamental basis of the enforcement process is to provide the appropriate penalty for contempt of court. On this basis, the Ombudsman considered that the public interest was strong in release of information to assist the enforcement process, and thereby to maintain the integrity of the judicial system and respect for the law.

The Ombudsman acknowledged there were considerations favouring withholding, which needed to be weighed against the public interest in release. He noted that one of the purposes of the OIA is to protect information to the extent consistent with the preservation of personal privacy. However, the Ombudsman observed that the provisions of the Act expressly recognise there will be occasions where the public interest will favour disclosure of certain information, even though doing so may affect the privacy of natural persons.

Before making his decision as to where the balance lay between the competing interests, the Ombudsman carefully considered the views of the Privacy Commissioner, DWI, the Principal Tenancy Adjudicator, the Chief Executive of the Ministry of Housing, the Attorney-General and the President of the Law Commission.

The Ombudsman identified the two major competing considerations to be, on the one hand, the administration of justice and, on the other hand, an individual’s right to keep personal address details private. The Ombudsman noted the nature of the remedies available to a judgment creditor under Part 6 of the District Courts Act and considered it apparent that Parliament had placed a priority on the right of a judgment creditor to have the judgment enforced, as against the right of a judgment debtor to be free from any interference with their privacy. In particular, where a judgment creditor is unable to serve enforcement proceedings on a judgment debtor, Parliament has accepted that the arrest of the judgment debtor for the purposes of examination and subsequent enforcement is warranted. Parliament is the ultimate arbiter of what is in the public interest, and it enacts laws because they are seen to be in the public interest. Accordingly, the arrest of a judgment debtor where service cannot be effected is seen by Parliament to be in the public interest, notwithstanding that such arrest involves an invasion of privacy.

It seemed to the Ombudsman that the act of arrest is at least as significant, an invasion of privacy as the disclosure of a person’s address for the purposes of enabling service of documents in legal proceedings to which that person is not only a party, but a party against whom a Court has entered judgment. Accordingly, the Ombudsman considered that the statutory right to have a judgment debtor arrested where service cannot be affected is a strong indication of the public interest balance.

# Outcome

It was the Ombudsman’s view that section 9(2)(a) applied, but the privacy interest of the individuals to whom the address information related was outweighed by the public interest considerations favouring disclosure of the information to the Department for Courts on each requester’s behalf, subject to the condition that the Department use the information only for the purpose of enforcing the requester’s judgment order.

Given the potential volume of similar cases that might be brought as individual complaints under the OIA, the Ombudsman approached the Department for Courts and asked whether there was a way to give effect to his view in this case in a more systematic way. The Department for Courts advised that it would be able to receive address information concerning a specified judgment debtor direct from DWI in response to a request under the OIA by a judgment creditor, and ensure that the information was used only for the purposes of enforcing the judgment order to which the request related. The Department for Courts was also confident that it had the capacity to ensure that the address information would not be made available to any other party, including the requester, or used by the Department for Courts’ own staff for any other purpose.

Both the Department and the Privacy Commissioner questioned the effectiveness of disclosure, but neither suggested that the Department for Courts was unable to satisfactorily ensure confidentiality of the address information provided to it pursuant to the fines collection process (under section 126A of the Social Security Act). There seemed to be no reason why the same integrity could not be maintained in respect of the enforcement of Tenancy Tribunal or Court orders.

The Ombudsman therefore recommended to the Chief Executive of the Ministry of Social Development (MSD) that MSD should contact the requesters to make arrangements for disclosure to the Department for Courts of the current address information it held in respect of the individuals against whom they had obtained a judgment order. The Ombudsman also recommended that MSD reconsider fresh requests from complainants who had previously received refusals to similar requests for address information. These other complainants were advised of the outcome of the Ombudsman’s investigation as promised.

Initially, there was disagreement with the Ombudsman’s view. Following receipt of the Ombudsman’s recommendations, the Attorney-General on behalf of MSD commenced proceedings in the High Court seeking judicial review of the Ombudsman’s recommendations. Subsequently, however, the Attorney General withdrew the proceedings and MSD complied with the Ombudsman’s recommendations.

MSD then undertook work with the Ministry of Housing and the Ministry of Justice to establish a process to supply, on request, judgment debtor address details directly to the Collections Unit of the Ministry of Justice. The process was successfully implemented and in 2010 it was formalised in legislation, through an amendment to the Residential Tenancies Act 1986. It is restricted in its scope to cases where creditors want to enforce Tenancy Tribunal orders and have already taken all reasonable steps to attempt to locate the judgment debtors themselves.

*This case note is published under the authority of the* [*Ombudsmen Rules 1989*](http://legislation.govt.nz/regulation/public/1989/0064/latest/DLM129834.html?src=qs)*. It sets out an Ombudsman’s view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.*