

Transfer of request from Tertiary Education Commission to Associate Minister

Legislation	Official Information Act 1982, s 14(b)(ii); Ombudsmen Act 1975
Agency	Tertiary Education Commission
Ombudsman	Mel Smith
Case number(s)	W51428
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Minister had instructed Commission to transfer all requests regarding a training centre for his consideration—OIA does not provide for blanket policy to transfer all requests on a subject—Commission must consider requests on case by case basis—information in this case not more closely related to functions of Associate Minister—decision to transfer request contrary to law

A requester wrote to the Tertiary Education Commission requesting certain information about a training centre going into receivership. In response, the Commission advised the requester that it had decided to transfer his request to the Associate Minister of Education (Tertiary Education) under section 14(b)(ii) of the OIA.

Correspondence was then exchanged between the requester and the Commission about the decision to transfer the request. The Commission advised that the transfer had been effected in order to *'gain the appropriate and necessary authorisations'*.

The Ombudsman first advised the requester that his investigation of the Commission's decision to transfer the request would have to be conducted under the Ombudsmen Act because the OIA does not give him jurisdiction to review such a decision. As a result, the Ombudsman advised that the focus of his investigation would be whether the decision to transfer the request was reasonable.

The Ombudsman asked the Commission to explain why it considered the information was more *'closely connected with the functions'* of the Associate Minister of Education (Tertiary Education). The Ombudsman referred to the Commission's original letter of refusal, noting that

section 14(b)(ii) cannot support any notion of transferring official information requests in order to *'gain the appropriate and necessary authorisations'* from a Minister.

The Commission advised that, at the time of the request, there was a large amount of interest in and discussion about the training centre, both within the tertiary education sector and the media. The complainant's request was just one of a number that had been received by the Commission and the Associate Minister. Given the sensitivity of the issue at the time, the Commission advised the Ombudsman that the Associate Minister wanted to ensure all requests for information were dealt with consistently. His office had therefore instructed that all OIA requests about the training centre received by the Commission around the time of the receivership should be transferred to him.

However, the Ombudsman noted that the OIA does not allow requests to be transferred under a blanket policy simply because the requests are for similar information or information on a particular matter. Rather, the OIA requires an agency to consider each request for official information separately and on its own merits, identifying the specific information requested and making a decision on the particular request. This is because, while requests may be for similar information, they will not always give rise to the same issues in terms of disclosure.

Further, the Ombudsman also noted that the Commission itself did not have any concerns about releasing the requested information, yet it took 49 working days for the Associate Minister to formally respond to the original request. Therefore, the transferring of this particular request under the blanket policy resulted in the response being unnecessarily delayed.

Finally, the Ombudsman observed that the number of requests received is not a relevant consideration in terms of section 14(b)(ii). Nor does the OIA provide for the transfer of requests on the basis that either the information requested is politically sensitive or there is a desire to coordinate responses to requesters.

The Commission then explained to the Ombudsman that both the training centre and the Commission considered they were each owed money by the other and the Crown was therefore also concerned not to prejudice its position in respect of any future legal action for the recovery of that money. Given the potential risk to the Crown, the Associate Minister was of the view that he should manage the release of the requested information.

The Ombudsman reviewed the functions of a Minister in respect of a Crown entity within his or her portfolio. He referred to the Cabinet Office Circular (99)13, which states:

Ministers are guardians of the Crown's interest in Crown entities, and are responsible for them to Cabinet and ultimately to the House of Representatives.

He also noted the State Services Commission's Occasional Paper No. 18 on the respective roles of Ministers and Crown entities, which states that in general terms, the role of a Minister is to ensure that:

- the government (and Parliament's) policy objectives are being advanced;
- the Government's interests and risks are properly managed; and

- there is proper accountability and control of public organisations that spend money and exercise public powers.

The Ombudsman then considered the specific information that fell within the scope of the complainant's request. He noted that it appeared to relate strictly to the operational functions of the Commission, which are concerned with negotiating profiles, approving funding, and monitoring tertiary organisations' performance. Accordingly, he was unable to see how this kind of operational information raised issues of *'possible risk to the Crown'*.

It was the Ombudsman's view that the blanket decision to transfer all official information requests concerning the training centre to the Minister could not be justified in terms of the OIA.

The Ombudsman was willing to accept that certain information may be *'more closely connected'* with a Minister's functions where its release would prejudice the Crown's interests in the way described by the Commission. In those circumstances, transferring the request to the relevant Minister may be an appropriate course of action.

However, after considering the information to which the complainant's request related, the Ombudsman was of the view that this specific information was not more closely connected to the functions of the Minister. Therefore, section 14(b)(ii) did not allow for a transfer to take place in this particular case. As a result, the Commission's decision to transfer the request had been contrary to law and it was required to make the decision on the request.

The Ombudsman formally recommended that the Commission amend its practice in light of the outcome in this case. As required by section 22 of the Ombudsmen Act, the Ombudsman also sent a copy of his view to the Minister responsible for the Commission.

The Commission later confirmed that the necessary steps had been taken to change its practice concerning the transfer of requests to the Minister.

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