

Request for serious incident review

Legislation	Official Information Act 1982, s 9(2)(a)
Agency	District Health Board
Ombudsman	Ron Paterson
Case number(s)	379151
Date	30 June 2015

Section 9(2)(a) OIA applied—although significant information was already in the public domain withholding was necessary to protect the family’s right to be left alone in circumstances where highly distressing events had resulted in significant media and community attention—public interest in accountability for the clinical competency of DHB staff and the proper investigation of serious incidents required disclosure of summary

Background

A new mum was found not guilty of the attempted murder of her baby by reason of insanity. A journalist asked the District Health Board (DHB) for information about its investigation into the care provided to the mother. The DHB noted that it did not have the mother’s consent to release the ‘serious incident review’ report, which it therefore withheld in order to protect her privacy. The requester complained to the Ombudsman.

Investigation

The Ombudsman requested a copy of the information at issue and an explanation of the reasons for withholding. He also consulted the Privacy Commissioner before forming his opinion.

Privacy

Section 9(2)(a) of the Official Information Act (OIA) applies where withholding is necessary to protect the privacy of natural persons.

The requester argued that the mother's privacy interests were diminished because the events had been well-publicised. The Ombudsman acknowledged that significant information was in the public domain, including information voluntarily disclosed by the parents. However, the Ombudsman considered that the right to privacy is broader than just 'informational privacy', which might be diminished by prior disclosure, and includes the right to be left alone. He stated:

The law has long recognised that personal privacy is a broad concept which does more than simply protect information about a person which is not in the public domain. Legal scholars Samuel Warren and Louis Brandeis (later Associate Justice Brandeis of the United States Supreme Court) wrote about this broader conception in their paper 'The Right to Privacy', in the 1890 Harvard Law Review. Warren and Brandeis identified court decisions which had extended legal protections of privacy into territory described as 'the right to be let alone'. The writers considered that even the publication of 'gossip' which might otherwise be 'apparently harmless, when widely and persistently circulated, is potent for evil', and that personal privacy rights may be engaged to prevent such harm.

This formulation of personal privacy was relevant in circumstances where the family, as a result of extremely distressing medical events, had been the subject of intense media attention. Articles about the family had been persistently circulated and were widely available on the internet. The family had reportedly been the subject of abuse by members of the public.

The Ombudsman considered whether it would be appropriate to obtain the family's views on disclosure of the information at issue. However, the DHB argued that this would cause the family undue distress. The Ombudsman accepted this, and proceeded on the basis that the family was unlikely to consent to disclosure.

The Ombudsman concluded that disclosure of further information could re-victimise the family by exposing them and the distressing circumstances at the heart of this matter to further, potentially unwelcome, public scrutiny. In his opinion, withholding was necessary to protect their right to be left alone.

Public interest

Section 9(2)(a) is subject to a public interest test. This means the need to withhold must be balanced against the countervailing public interest in release. If the countervailing public interest weighs more heavily, the information must be released. If not, it can be withheld.

The Ombudsman identified a strong public interest in the disclosure of information regarding the clinical competency of DHB staff, and the adequacy of any investigation into a serious incident. In his view, this required release of summary information about the methodology of the investigation and the findings and recommendations that related to clinical competency.

Outcome

The Ombudsman concluded that there was good reason to withhold personal information about the family. The DHB agreed to release summary information about the methodology, findings and recommendations of the review, and the complaint was resolved.

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