

## Application of OIA to information held by a Benefit Review Committee

<b>Legislation</b>	Official Information Act 1982, ss 2(2), 2(3), 2(6)(b)
<b>Agency</b>	Department of Work and Income
<b>Ombudsman</b>	Anand Satyanand
<b>Case number(s)</b>	W46821
<b>Date</b>	November 2001

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*Application of OIA to information held by a Benefit Review Committee (BRC)—status of a BRC for the purposes of the OIA—whether a BRC is a ‘Tribunal’—information held by a BRC is subject to OIA*

Two issues of jurisdiction were raised by the then Department of Work and Income (now Ministry of Social Development) in the course of an investigation concerning a Benefit Review Hearing. These were:

- whether a Benefit Review Committee (BRC) was an organisation for the purposes of the OIA; and
- whether a BRC is a ‘Tribunal’ for the purposes of section 2(6) of the OIA.

BRCs are not named in either Schedule 1 of the Ombudsmen Act or the OIA. However, sections 2(2) and 2(3) of the OIA provide:

- (2) *Where information is held by an unincorporated body (being a board, council, committee, subcommittee, or other body, but not being a mortality review committee)—*
- (a) *which is established for the purpose of assisting or advising, or performing functions connected with, any department or Minister of the Crown or organisation; and*

(b) *which is so established in accordance with the provisions of any enactment or by any department or Minister of the Crown or organisation,—*

*that information shall, for the purposes of this Act, be deemed—*

(c) *in any case where that body is established in respect of any department or organisation, to be information held by that department or organisation; and*

(d) *in any case where that body is established in respect of a Minister of the Crown, to be information held by that Minister.*

(3) *Where subsection (2) applies in respect of any unincorporated body and that body is established for the purpose of assisting, advising, or performing functions connected with any department or organisation, that unincorporated body shall, for the purposes of this Act, be deemed to be part of that department or organisation.*

Because BRCs are unincorporated bodies, ‘committees’, and are established pursuant to an Act to perform the function of reviewing departmental decisions on benefit applications, they appear to fulfil the requirements of section 2(2). Pursuant to section 2(3), information held by BRCs would be deemed to be held by the Department for the purposes of the OIA.

The second issue for consideration was whether a BRC is a ‘Tribunal’ for the purposes of section 2(6) of the OIA which states:

(6) *For the avoidance of doubt, it is hereby declared that the terms **department** and **organisation** do not include—*

(a) *a court; or*

(b) *in relation to its judicial functions, a tribunal; or*

The Department contended that a BRC is a ‘Tribunal’ and that accordingly, in relation to its judicial functions, the OIA would not apply to information held in relation to those functions.

Consideration was given to the High Court’s decision in *Commissioner of Inland Revenue v B* [2001] 2 NZLR 566. The presiding Judge, Justice Wild, stated that when considering the matter of whether a person or body is acting as a tribunal, the issue is whether that person or body is acting judicially or administratively. Justice Wild then applied the ten tests formulated by Lord Diplock in the House of Lords in *Trapp v Mackie* [1979] 1 All ER 489, stating:

*I accept that ... there exists no clear watershed between functions administrative and those judicial. Nevertheless, the Trapp tests are all useful ‘touchstones’ (Lord Diplock’s word at p 492 of Trapp) and their application points convincingly to an administrative function.*

The tests can be applied in relation to the BRC as follows.

Test (1): Is the determination authorised by law—was it constituted pursuant to an Act of Parliament?

Answer: Yes, BRCs are constituted pursuant to the Social Security Act 1964 and are empowered to make decisions that confirm, vary or revoke the decision being reviewed.

Test (2): Is the inquiry into an issue in dispute between parties of a kind similar to issues that commonly fall to be decided by courts of justice?

Answer: Only in a limited sense. The Act appears to contemplate a BRC ‘review’ as encompassing a general reappraisal of the exercise of an administrative function or power, which may include matters of policy and discretion. It does not seem to be confined to the sorts of issues normally decided by courts of justice.

Test (3): Is the inquiry held in public?

Answer: No.

Test (4): Are decisions as to what oral evidence should be led and what documents should be tendered or their production called for left to the contending parties?

Answer: This does not appear to be the case. There are no statutory provisions applying to how reviews are to be conducted. There is no requirement for a ‘hearing’ and section 10A(6) of the Social Security Act simply speaks of ‘meetings’ of a BRC.

Test (5): Are witnesses whom either party wishes to call compellable, under penal sanctions, to give oral evidence or to produce documents; and entitled to the same privilege to refuse to answer a question or produce a document as would apply if in a court of law?

Answer: No.

Test (6): Is the oral evidence given on oath; if a witness knowingly gave false evidence would that witness incur criminal liability for perjury?

Answer: No. BRCs have no power to require evidence to be given on oath.

Test (7): Are witnesses who give oral evidence subject to examination-in-chief and re-examination by the party calling them and to cross-examination by the adverse party, in accordance with the normal procedure of courts of law?

Answer: No. BRCs have no power to compel witnesses to appear.

Test (8): Are the parties entitled to be represented by legally qualified advocates or solicitors and given the opportunity of addressing the tribunal on the evidence that had been led?

Answer: No.

Test (9): Would the determination have a major effect on the parties?

Answer: Yes, subject to an applicant’s right to appeal under section 12J of the Social Security Act.

Test (10): As a result of the determination, can either party be ordered to pay costs or expenses recoverable in the same manner as those awarded by a civil court?

Answer: No.

Applying these tests suggests that BRCs are not *'Tribunals'* performing judicial functions but rather administrative committees performing an administrative function. Further support for this view is that:

- Two of the three members of each committee must be departmental employees who, on their own, form a quorum for a meeting of a BRC.
- There is no formal statutory procedure for hearing the parties, the calling of evidence, or the cross examination of witnesses. Although normal principles of natural justice may apply to BRC reviews, this would not convert an administrative review into a judicial function. Natural justice applies as much to administrative functions that affect individuals, as it does to judicial ones.
- The departmental members are appointed by the Chief Executive, *'from time to time; or in respect of the particular review'*, and the non-departmental member is appointed by the Minister to hold office *'during the Minister's pleasure'*. Both these factors detract from the independence required of persons expected to perform a judicial function.

The Social Security Act makes significant distinctions between the establishment, functions, powers and procedures of the Authority, which are specified in detail, and the broad *'review'* function of the BRCs which also suggests that such committees were not seen by the legislature as performing a judicial function.

It therefore appears that a BRC has administrative not judicial functions, and that, accordingly, it is not a *'Tribunal'*. Consequently, it followed that information held by a BRC is official information deemed to be held by the Ministry of Social Development pursuant to sections 2(2) and 2(3) of the OIA.

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