

# Address to NZ Schools Trustees Association (NZSTA)

- OOO:** Chief Ombudsman Peter Boshier
- Staff:** None
- Date:** Saturday, 13 July, 8.30am
- Venue:** The Regent Theatre, 17 The Octagon, Dunedin
- Theme:** *Creating Educational Success – the next 30 years*
- Title:** *Your OIA rights and responsibilities – now and in the future*
- Synopsis:** The Official Information Act (OIA) should be seen as tool for progress, not an administrative burden. Chief Ombudsman Peter Boshier will address some of the issues Boards face with their schools, staff, pupils and parents, and how the OIA can help in school governance.

\* \* \* \* \*

## Your OIA rights and responsibilities – now and in the future

### Conference theme: *Creating Educational Success – the next 30 years*

Tena koutou katoa.

Thank you for inviting me to the deep South for your conference.

I want to start by acknowledging and thanking you all for the time, skill and energy you commit to New Zealand's schools and young people.

And a special welcome to those of you who became new trustees after recent elections.

I specifically want to recognise the 30-year journey the education sector has gone through since Tomorrow's Schools was unveiled in 1989.

It's astonishing to think what it must have been like for those first trustees – an untested system in uncertain times, socially, economically, and culturally.

Since then, the pace of change has been relentless, and the rise of IT, and in particular social media and the challenges that has brought, especially for young people, has totally transformed how Boards must operate.

Yours is an evolving responsible to the community, the crown, but most importantly the parents, and therefore the children at your school – yours is an important mandate, and I am heartened that so many New Zealanders like you participate.

The conference theme, *Creating Educational Success – the next 30 years*, resonates with the purpose and work of my Office.

## **Times of change**

I say this because in the past 30 years, the role of the Office of the Ombudsman has also changed significantly.

In the education sector, it is also a time of significant change – reforms, changes to policy, not to mention the ongoing case being made by teachers for better pay and conditions.

It is a sector of many, many moving parts, and boards of trustees are not immune to any changes in any of them.

I understand there are about 18,000 people on school boards – that is a huge number of New Zealanders actively ensuring the education of our children is in good hands and run well.

It is a daunting responsibility as, by dint of your work, you are influencing what our society will look like on the future – your role in school governance is an extremely important one.

Representing nearly 2,500 state and state-integrated schools, boards of trustees make up New Zealand's biggest single group of crown entities.

You're also almost certainly the most diverse – you come from all walks of life and all parts of your communities.

More than that – school rolls go from more than 3,000 to single figures, there are special units, special schools, private schools to name a few.

You are urban and rural – in the schools you represent and amongst yourselves there are differing levels of diversity, different skills, and differing senses of community.

There is no way that Rangitoto College will have the same issues or pressures as eight-pupil, one-teacher Rangitaiki School near Taupo – although I must say the latter has a vibrant website, and is clearly at the centre of its tiny community.

To that extent, I would like to acknowledge NZSTA for the support and leadership you provide to boards of every hue – your very high membership is reflective of the value you add and support you provide.

## **The education intersection**

This morning I'm going to talk about my work as Chief Ombudsman and where it intersects with yours as school trustees.

Our relationship with school boards of trustees is one of the most important we have.

Largely it is because you are elected officials – being on a Board of Trustees is not a profession – you have opted to do this job out of a sense of obligation and duty, and that is a selfless thing to do.

You have taken on responsibilities, some of which will be unfamiliar to you, yet the weight of those responsibilities is large.

You also have many stakeholders – the school, the staff, the parents, whānau, pupils and the wider community.

Now I realise that some of you in your ‘real work’ will have dealt with the Office of the Ombudsman and be familiar with the various bits of legislation under which we operate.

I also understand that some of you will be less familiar – but to all of you I say my Office is here to help, guide and advise you in your role as trustees.

What I don’t want to do is scare you witless by the potential complexities and bear pits of what your role as a trustee is.

In many cases, the policies and procedures you inherit in your role will have been built over the years, and nuanced and changed as circumstances require be it through policy, legislation or the specific needs of your school and community.

This should give you a good platform, but governance is not static – vigilance is so important to ensure you continue to serve effectively and progressively.

## **The role of the Office of the Ombudsman**

I’m appointed to ensure New Zealanders can have trust and confidence in those who make decisions that affect people, and that people are doing so fairly.

I operate under five pieces of legislation, but I will focus on two of our Acts today, the Official Information Act and the Ombudsmen Act as those are the main ones you will deal with as trustees.

This is what people think of my Office – ‘my Office’ as I am Chief Ombudsman and also effectively Chief Executive.

It’s fairly straight-forward although it does highlight some misconceptions such as the oversight of companies which we don’t do – and alas, there is no mention of the role you trustees play.

One of our key roles is to inform the public, including trustees and schools, about what we do, and how they can, and should, access our services.

Boards of trustees are in an almost unique position as they work on both sides of the OIA.

You are subject to the OIA requests, but in turn can also use the legislation to get information when you need it from agencies such as the Ministry of Education – you are both receivers and instigators.

The receiving side is the one you will probably deal with most.

You will always get parents who have gripes or who do not like how the Board or school is acting – that is least palatable part of your job, and I have empathy for you when such circumstances arise.

This can also stretch the resources you have, so get advice from my office if that is the case – it is often the small irritants that take the most time, and I urge you as trustees to use what is available rather than trying to reinventing the wheel.

There are plenty of precedents we have which my staff can refer to which will help you make good decisions in a timely manner.

We resolve, and where needed investigate, complaints under the OIA where a requester isn't satisfied with the timeliness or the content of an agency's response to a request for information.

## **By the numbers**

Most of the complaints are about unresolved issues, delays in response or refusals in part or full to release information.

In the 2017/18 year, we received OIA 59 complaints regarding boards of trustees, a low number given the enormity of the sector.

I would like to think that this is an indication that Boards are, by and large, doing their jobs well and dealing with requests well and promptly.

This may well be the case, but I suspect that some complainants do not know they have free access to my Office, something you can't say about many things these days.

This includes both parents and pupils, and the responsibility for informing them of that falls to both you as Trustees, and me as Chief Ombudsman.

To that end, my office has produced an array of resources covering everything from making a complaint to constitutional conventions – there are some excellent resources for Boards of Trustees as well.

We are also engaging with school communities and the Ministry in the development of a school leaver's toolkit that gives better information on integrity agencies such as mine, what we stand for, and what we hope to achieve.

## **The principle of availability**

The starting point for considering any request for official information is the principle of availability.

Information must be made available on request unless there is a good reason for withholding it.

But the importance of being subject to the act is to recognise what is official information and the need to exercise care.

It's also worth noting that there is a very broad and evolving definition of 'official information'.

It doesn't just cover traditional paper based information – it also includes e-mails, photographs, video recordings, blogs, vlogs, text messages and tweets.

It's also worth noting that the information does not have to be recorded anywhere – information held in an official's memory can also be official information.

Once the agency holds the information, it is official information.

It does not matter where the information is found or who created it.

And finally, information stored privately can also be official if it relates to the information requested and could have a tangible bearing on an investigation.

This was the case a few years ago when then Prime Minister John Key refused to release a text message he had received from a journalist about what became known as 'Ponytail-gate'.

The Prime Minister's office claimed it was not official as it was received in a capacity as a private citizen.

My view differed – I concluded that it was held in the Prime Minister's capacity as Minister of the Crown and, as such, the OIA applied as there was no good reason to withhold the information on grounds that it was subject to an obligation of confidence.

I also made the point that there was no blanket protection for 'off-the-record' communications between Ministers and members of the media – each case must be judged on its own merits.

Now given the media furore that swirled around this issue, there was also considerable public interest, another factor I have to consider when making a decision.

Interestingly, in late 2017, I decided that Prime Minister Jacinda Ardern was entitled to refuse requests for a document relating to coalition negotiations.

The starting point was considering the definition of 'official information'.

In this instance, it was clear that the information in Ms Ardern's capacity as Labour Party leader, and while considered during the coalition negotiations, it did not form part of the final coalition agreement.

It was not used in any ministerial or official public capacity, nor used to make policy decisions when it may have been subject to OIA scrutiny.

So while there may have been public interest in the document, there were no grounds to ask for its release.

Both these cases were reasonably simple as the circumstances clearly dictated the course of action – this is not always the case.

## **Improve the operation of the OIA**

Our key task with the legislation is to improve the operation of the OIA.

So what does this mean, in practical terms, for the agencies of which we have oversight?

In a nutshell, we are seeking to educate, and thereby improve the quality of transparency and accountability in the public sector, so that people and organisations making complaints have fair and reasonable access to information.

The key thing to remember is that my office only gets involved if there is a dispute between a requester and your Board.

The first port of call is always to the Board of Trustees, and if the requester is for any reason unsatisfied with the response or its timeliness, then they can approach my Office to mediate a solution.

We are a place of redress should people feel they have been denied the information they desire – the last chance saloon if you will.

### **Monitoring and assisting**

Another area of my work concerns monitoring agencies and assisting them in their work.

Last September, my Office published our first significant compliance and practice investigations into OIA practices in four public sector agencies – we have since released a couple more, and there will be a further six in the coming months.

This is an example of two of our key tasks – to monitor agencies' OIA practices and capabilities, and to give advice and guidance

In essence, it means we are here to help agencies operate better under legislation such as the OIA, and this includes boards of trustees.

It's integral to our long-term strategy that we help raise the quality of official information delivery from the public sector.

I have to reinforce that the reports are not exercises in casting blame or being critical for criticism's sake – they are also not used to rank agencies.

The key thing about these reports is that they not only help the agency involved, they also show other agencies what best practice can look like, and thereby help them improve.

They show individual performance, commonalities, and where there might be room for improvement.

Am I impressed with the results of these so far?

Overall, yes – I believe there is a genuine commitment by most agencies to change for the better.

None of the 12 agencies we have looked at so far have a perfect model, and all are nuanced for their particular situation.

But every agency has made a commitment to improve and take on recommendations, and that is the aim – systemic improvement across the public sector.

Now, it is quite possible that at some stage in the future, I will have a look at some boards of trustees.

It would be done on the same principle – having the reports used as examples for others to follow.

And again, within legislative and procedural guidelines, there has to be a pragmatic ‘horses for courses’ approach when dealing with matters of governance, reporting, and dealing with requests – no two schools are the same.

So would the existing reports be useful for you as BoT members?

I think so – so far we have monitored central and local government agencies, but the fundamentals of dealing with requests and complying with legislation are, at a high level, the same.

### **Frivolous, vexatious or trivial**

Something we occasionally see is the asking of ‘frivolous, vexatious or trivial’ requests that causes unreasonable harassment or distress to agencies.

For you, this may take the form of seeking personal information about staff or students, and might include derogatory or defamatory remarks for example.

The threshold for declaring a request ‘frivolous or vexatious’ is high – requesters should not be unfairly denied the opportunity to make genuine requests.

In one case, I said a requester should be given an opportunity to withdraw any abusive remarks and redraft their request.

My basis for doing this was that if the requester chose not to do so, it would infer that the motive for his request was frivolous or vexatious.

There are some ways to avoid such behaviours, the key one being what we term proactive disclosure.

I note that some schools routinely put up minutes of board of trustee meetings on their websites, while others don’t.

I am keen for agencies, including boards of trustees, to consider moving to a model that promotes proactive release of information, the most obvious being meeting minutes.

This is about being open and accountable to those who are being represented – in your case, staff, parents, pupils and the community.

### **Redaction**

I would note that the OIA does accommodate the redaction or editing of any information being given out, but again the criteria are quite tight.

The legislation sets out what those good reasons for refusal are – to the chagrin of some, administrative inconvenience is not a reason for refusal.

So, in all your answers to requests, know this rule exists, but use it very judiciously.

One way of looking at it is to adopt the stance of "Why shouldn’t I release this information?", rather than asking “Why should I release this information?”

I have spoken to several central government agencies who are moving to such a model, and without exception, they are reaping benefits.

Whilst understanding this may be a big leap away from current practice for many of you, I strongly urge you to consider making this step to proactivity – that's your challenge.

My consistent message is that the OIA is not a bureaucratic compliance exercise.

Properly used, the OIA is an excellent tool for enhancing the reputation of agencies including BoTs, by demonstrating that their processes will withstand public scrutiny.

## **The use of discretion**

Just this week, I was asked my opinion on whether it was reasonable for a principal, backed by their Board of Trustees, to refuse to allow a student to wear a kilt at a prize-giving.

The issue was whether the decision was discriminatory in that a female student was allowed to wear a korowai to the same event.

I am not now going to go into detail about the issues, as I wish to preserve reasonable anonymity and privacy.

But I will say that it was not as straight-forward as one person being given permission and another not – there was plenty of evidence that the decision had been made with due care.

However, a key issue in the case was that the school had a uniform policy, but did not have a policy regarding a student wearing a non-approved uniform at formal events, and therefore the granting of that permission was discretionary.

That the issue made it to the Board of Trustees shows you the passion with which views can be held, and the need for sound policies and procedures.

That is not a direct criticism of the school – its uniform policy is clear and unambiguous, and to be fair, it would be impossible to have a policy that covered every permutation of every policy.

However, what might have been useful would have been to note in the policy that the principal also had discretionary right for certain situations.

This was the type that the operational arm of the school – the principal and staff – make every day.

## **Handling bullying**

Bullying – physical, mental and cyber – is, alas, a major factor at many schools, and I believe is one of the single most important issues that schools are required to deal with.

A number of cases have asked me to enquire into a school's handling of bullying allegations with a view to closely questioning whether schools have a sufficiently clear anti-bullying policy and whether it is acted upon.

For all the resources, teaching, and even policies that are put in place, it is often unseen by many and unreported by most.

I recently dealt with a complaint involving a failure on the part of the school to deal with bullying behaviour and the consequences arising from that failure.

A student was subject to bullying and decided to take a knife to school to dissuade other students from continuing with their taunts.

At any time, not the right thing for the pupil to do, but there had been a history of bullying against this student, and clearly, the vigour of youth won out against the wisdom of even a fairly young age.

He was excluded for having pulled the knife out of his pocket during an incident – but as always there is more to the case than meets the eye.

The school acknowledged that the decision making process should be fair, but did not accept that the process outweighs the primary action which triggered the disciplinary process, namely the knife.

In summary, the Board took a stance, via its lawyer, that it needn't consider natural justice.

To me, this is totally unacceptable – through its policies, the Board had the power to use discretion, yet it chose not to despite the special circumstances.

Further, the school did not use Ministry of Education's Guidelines on the basis that they are 'not rules' – this to me was equally concerning.

In short, the school eventually did accept my final opinion, and the recommendations I had, none of which I believe were unreasonable given the circumstances.

The pity of this case was that it got litigious – certainly it was a very complex case, and I can't divulge all the details, but it is the type of issue where you as trustees may be put into a position where what is right and what is fair are at odds with each other.

Another investigation concerned the bullying of a child with special needs.

In this instance, we did not uphold the complaint as it was evident that the school had used a variety of methods to eliminate bullying, albeit not entirely successfully.

And there is no contradiction here – in my first example, my view was that the school used an unnecessarily heavy hand when a different course of action may have been a better option.

In the second example, the school had taken sufficient action to minimise bullying, and I was satisfied that was enough to uphold the Board's decision.

Of course, we are all sympathetic for the victim of the second case, and this was one of those instances I didn't particularly like the findings I reached.

## **Getting it right**

I might think it would be nice if the evidence and analysis had led to a different conclusion.

However, my responsibility is to get it right – fairness for all is not the same as pleasing everyone.

Having said that, I am very conscious that the way we convey a decision can be as important as the decision itself – we need to acknowledge that a decision may not please someone, and we must communicate that with the curious mix of empathy and analysis.

I think people are far more accepting of a decision when they understand how it was made – they want to know whether all points of view were carefully considered before an opinion was formed.

In short, the robustness of the decision is crucial – it must give resolution, transparency wherever possible, and above all, allow all parties to move on.

And here is one of the oddities of the Ombudsman’s Act – while I can make recommendations in my reports and opinions, I have no ability to compel an agency to act in a certain way or take specific remedial action.

In some countries, my equivalent has powers as wide as the potential to dismiss the government ...

However, it is very rare for an agency not to follow my recommendations if not in full, then in part.

My Office is seen as a fair arbiter – ‘fairness for all’ is our motto – and the level of independence, discretion and lack of prejudice means that our voice is heard, well respected, and usually heeded.

## **The end of seclusion**

In late 2017, I released final opinions on two cases involving the treatment of autistic children, one in Invercargill and one in Wellington.

The cases were similar in that they involved the use of seclusion rooms in an attempt to moderate the pupils’ behaviour.

In both cases, the school had let down the pupils with their actions – in the Wellington case I went as far as to say the school had acted unreasonably and oppressively, and recommended the school pay the family \$3000 along with making a formal written apology.

In the Invercargill case, the BoT had to deal with a flurry of complaints including some serious accusations including bullying and unexplained bruising.

This complaint involved a wider audience including the Police, Child, Youth & Family, the Ministry of Education, and independent report, and the Education Review Office.

Clearly it was too late to redress the experiences of the children and their families, but my involvement did prompt the Ministry to instruct all schools to immediately stop the use of seclusion.

Additionally, both the Ministry and ERO made substantial changes to other policies and processes in light of these two cases.

But at the end of the day, the buck stopped with the Board in each instance as it is responsible for setting the school policies and the performance management of staff.

So before I unnecessarily alarm you, let me emphasise that the underlying principle of the OIA is to be helpful – helpful to people wanting to know information, and helpful to agencies who are getting people involved in democracy and government.

### **We've also got your back**

My closing message is that if you are struggling with an OIA request, my Office is here to help.

Just email us or give us a call and we can give you advice on dealing with the request, or check out our website – we can also provide advice on good-decision making and administrative practices.

In this increasingly complex world, the education of our children is pivotal in maintaining a productive, vibrant and sustainable New Zealand.

Your schools are the engine rooms of our future, and I am privileged to have the opportunity to help to ensure that the machinery operates smoothly.

Being a trustee is an extraordinary job with an enormous number of responsibilities, and I hugely respect the time and commitment you all put in.

To paraphrase the STA – 'We've also got your back'.

I am more than happy now to take your questions.

E noho ra.