

Jurisdiction—information held by Arbitration Commission

Legislation	Official Information Act 1982, ss 2(1), 2(2), 2(3), 2(4)
Agency	Arbitration Commission
Ombudsman	John Robertson
Case number(s)	W1978
Date	Published April 1993

Official information definition— Arbitration Commission not subject to Act—whether information deemed to be held by Department of Labour—whether information held by officers or members as agents of Commission

A request was made to the Arbitration Commission seeking access to a legal opinion which it had obtained in relation to the registration of certain awards and agreements under the Labour Relations and State Sector Acts. In its reply to the request the Commission left open the question of whether the information could be requested under the Act, but in any event refused to release the information.

The primary issue raised by the complaint was whether the information was ‘*official information*’ in terms of the Act.

The primary definition of ‘*official information*’ in section 2 of the OIA refers to ‘*any information held by ... a department; or ... an organisation*’. The terms ‘*department*’ and ‘*organisation*’ are defined with reference to the bodies listed in Schedule 1 of both the Ombudsmen Act and the OIA. The Arbitration Commission is not listed in the Schedules to either Act. Section 2 also contains no fewer than 13 other paragraphs which either expand or restrict this primary definition of ‘*official information*’. A number of these are relevant in this case.

Sections 2(3) and 2(3)

These sections 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.*

The Labour Relations Act (now repealed), which was administered by the Department of Labour, establishes the Commission as an unincorporated body. The question was whether the purpose of its establishment had been either to ‘assist or advise’ the department or to perform ‘functions connected with’ the department. This required careful consideration of section 260(1) of the Labour Relations Act, which sets out the Commission’s jurisdiction as follows:

- (a) *To register awards and agreements*
- (b) *To hear and determine disputes of interest*
- (c) *To assist parties to settle disputes of interest*
- (d) *To handle matters referred to it by the Labour Court for settlement in connection with a strike in an essential industry*
- (e) *To give advice to the Labour Court if requested to do so*
- (f) *To exercise such other functions and powers as are conferred on it by this or any other Act.*

The Chief Ombudsman asked the Department of Labour to comment on whether, in its view, the Commission had been established for the purpose of *'assisting or advising, or performing functions connected with'* the Department.

The Department's view was that the Commission had not been established for the purpose of advising or assisting either the Department or the Minister of Labour because those activities were not encompassed in the list of functions set out in section 260. Although the function of providing advice was mentioned expressly in that section, it was confined to the provision of advice to the Labour Court. Moreover, the only functions performed by the Commission were those conferred by statute (section 260(2)).

Neither did the Department believe that the Commission was performing functions *'connected with'* it or the Minister of Labour. It referred to the statutory scheme of the Labour Relations Act and said that the Commission, in the area of its jurisdiction, acted independently. The Commission performed functions that were discrete and separate from those of the Minister or the Department. It was not subject to direction by the Department and the Commission was not required by law to liaise with the Department in the day to day exercise of its functions.

The Chief Ombudsman considered these points and came to the conclusion that the Commission could not be described as a body established to advise or assist the department itself. Instead, its functions were quite separate and distinct. The question of whether its functions were *'connected with'* those of the Department was less clear cut, but the Chief Ombudsman was of the view the independence of the Commission was such that it could not reasonably be said to be performing functions connected with those of the Department.

Accordingly, the Chief Ombudsman formed the opinion that the information in question was not *'official information'* by virtue of sections 2(2) or 2(3).

Section 2(4)

This section provided:¹

Information held by an officer or employee or member of a Department or organisation in his capacity as such an officer or employee or member or in his capacity as a statutory officer (other than in information which he would not hold but for his membership of a body other than; a Department or organisation) shall, for the purposes of this Act, be deemed to be held by the Department or organisation of which he is an; officer or employee or member.

Under section 270(2) of the Labour Relations Act, the Chief Executive Officer and the officers of the Commission were officers of the Department of Labour. This suggested that the information they held in their capacities as officers of the Commission was deemed by section

¹ Note, s 2(4) has since been split into two separate provisions, ss 2(4) and 2(4A).

2(4) to be held by the Department, unless it could be said that the only basis on which the information was held was by virtue of their *'membership'* of the Commission.

The Department contended that the words in parenthesis in section 2(4) were relevant in this case, that is, that the Commission's officers could be said to hold *'membership'* of the Commission. However, the Chief Ombudsman was of the view that this involved a wide reading of the term *'membership'* which was not supportable given the distinction which is drawn in both the Labour Relations Act and other sections of the OIA between *'members'* and *'officers'* of a body. The words in parenthesis in section 2(4) would apply if, for example, an appointed member of the Commission were also an employee of the Department.

Such a person would then hold the Commission's information only by reason of his or her membership of the Commission, and not as an employee of the Department. Accordingly, the Chief Ombudsman was of the view that the requirements of section 2(4) were satisfied in respect of the information.

Agency / safe custody exclusion

The Department also, however, referred the Chief Ombudsman to paragraph (f) of the definition of *'official information'* in section 2 of the OIA. This states that *'official information'*:

Does not include any information which is held by a department, Minister of the Crown, or organisation solely as an agent or for the sole purpose of safe custody and which is so held on behalf of a person other than a Department or a Minister of the Crown in his official capacity or an organisation;...

The Department suggested that, even if section 2(4) did apply, the information in question would be excluded from the definition *'official information'* if it was held by the Commission's staff as agent for the Commission members rather than in their own capacities as officers. The Chief Ombudsman was told that the legal opinion under request had been sought by the Chief Executive Officer of the Commission on the directions of the Commission itself. The Department's view was that, in seeking and holding the opinion, the Chief Executive Officer had been acting not on his own behalf but as agent for the Commission.

Whether an agency situation existed here or not depended on the facts. In this case, the Chief Ombudsman was doubtful that it did; the Commission's officers were described in section 270 of the Labour Relations Act as *'officers of the Commission'* and, accordingly, it was somewhat artificial to draw a distinction between the Commission and its officers in respect of an administrative function such as the obtaining and holding of legal advice.

On balance, therefore, the Chief Ombudsman concluded that the information was *'official information'* by virtue of section 2(4) and was not excluded by any other part of section 2 of the OIA. The Chief Ombudsman qualified this, however, by saying that the position was not entirely clear in relation to the application of paragraph (f) of the definition of *'official information'*.

This case note is published under the authority of the [Ombudsmen Rules 1989](#). 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.