

Request for copies of referee reports

Legislation	Official Information Act 1982, ss 27(1)(c), 23
Agency	Tertiary institute
Ombudsman	Nadja Tollemache
Case number(s)	A255
Date	April 1993

Note: This investigation took place prior to the enactment of the Privacy Act 1993. At that time Part 4 of the OIA and LGOIMA governed people's right to access personal information about themselves. 'People' in this context included both individuals and corporate entities.

When the Privacy Act came into effect, individuals' rights to access personal information about themselves became governed by that Act. This left Part 4 as a special code within the OIA and LGOIMA governing access by corporate entities to personal information about themselves.

A requester sought copies of referee reports in respect of course she had applied for—refused under s 27(1)(c)—two reports subsequently released with the referees' consent—third report was evaluative material—implied promise of confidentiality had been provided to the referee—whether other factors made it unfair to withhold—s 23 relevant—institute could withhold report if a statement of reasons was provided

In this case the requester completed Tier I of a course held at a tertiary institute. The following year she applied for entry to Tier II of the course. One of the requirements was that applicants nominate three referees to provide references to the institute.

The institute refused to allow the requester to enter Tier II. The requester then wrote to the institute requesting copies of her referees' reports. The institute refused, relying on section 27(1)(c) of the OIA. The requester was not satisfied with this response and wrote to me making a formal complaint about the refusal.

As a first step, the Ombudsman wrote to the referees asking whether they had any objection to their reports being provided to the requester. Two stated they had no concern with release. The institute then made those two reports available to the requester. Accordingly, only report required the Ombudsman's consideration.

Initially the Ombudsman was concerned that the report might not have been '*evaluative material*'. However, after careful consideration, she accepted that section 27(2)(a)(iv) applied. The information was evaluative material in that it was information compiled solely for the purpose of awarding a '*benefit*'. In this case the benefit was the right to enter Tier II of the course.

No express promise was provided by the institute to the referee that the report would be kept confidential. The Ombudsman had to consider whether an implicit promise could be derived from the context. In the circumstances of this case, she accepted that an implied promise had been provided by the institute to the referee that the report would be kept confidential.

In cases where it is established that a promise of confidentiality is operative at the time the information was supplied, it does not always follow that disclosure of the information would breach such a promise. If the supplier has no objection to disclosure, there is no basis to argue that disclosure would prejudice future supply of evaluative material.

The final matter to be considered was whether there were other factors which could render it unfair for the institute to exercise its ability to withhold the information even though the requirements of section 27(1)(c) were made out.

The Ombudsman considered that section 23 of the OIA was relevant in this case in that, if the requester had sought reasons for the decision not to admit her to Tier II, the organisation would have been obliged to provide reasons for its decision. While section 27(1)(c) is relevant in assessing the degree to which reference is made to the information on which any findings on material issues of fact are based (see section 23(1)(b)), it does not affect the obligation under section 23 to disclose those findings and the reasons for the decision or recommendation.

In this case the Ombudsman formed the opinion that the institute could withhold the report under section 27(1)(c) only if a statement of reasons (including such of the evaluative material in the report as was relied on) was provided to the requester. The institute accepted this view and provided an adequate statement of reasons to the requester.

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