

Ombudsman's approach to delay complaints

The purpose of this guide is to explain the Ombudsman's approach to complaints received under the OIA and LGOIMA about the alleged or apparent failure of an agency or Minister to make and communicate a decision on a request for 'official information' within the maximum statutory time limit.

Introduction

The Chief Ombudsman has decided to make changes to his handling of delay complaints alleging breaches by public sector agencies of the maximum statutory timeframe obligations set out in the Official Information Act (OIA) and the Local Government Official Information and Meetings Act 1987 (LGOIMA). He considers these laws to be cornerstones of New Zealand's democracy.

Responding to requests for access to official information is a legal obligation and therefore core business for public sector agencies and Ministers.

From 1 July 2022, the Chief Ombudsman will apply a new approach to his investigation and review of delay complaints he receives.

The Chief Ombudsman and his staff will still attempt to resolve such complaints informally and at the lowest possible level within the agency in the first instance, with a view to ensuring requesters receive the decision they are entitled to under the law.

However, he will be taking a stronger approach if agencies and Ministers are not taking steps to ensure they meet their statutory timeframe obligations for making decisions and communicating them to requesters. The OIA and LGOIMA provide a number of mechanisms to help Ministers and agencies manage the processing and decision-making required to respond to requests for access to official information and which would allow them to meet their statutory deadlines.

A complete failure to respond to a request within the time limits provided in these Acts is unacceptable.

The Chief Ombudsman intends to make formal findings and recommendations in these cases and report them to the relevant government ministers, local authorities and publicly to Parliament.

Objective

The Chief Ombudsman's intention is to implement an approach to delay complaints that:

- deters agencies and ministers from breaching their statutory timeliness obligations through the implementation of a swift, consistent and robust response to complaints;
- seeks to balance the Chief Ombudsman's focus on the early resolution of complaints and incentivising agencies and ministers to acknowledge and resolve delays expeditiously with the Chief Ombudsman's statutory function to formally investigate and review complaints about a failure to meet statutory timeliness obligations;
- is streamlined and efficient and attempts to minimise the expenditure of significant resource, while supporting the Chief Ombudsman's strategic goals including improved OIA and LGOIMA compliance across the public sector;

- encourages Ministers and agencies to manage the processing and decision-making required to respond to requests for access to official information in accordance with the law, including using relevant mechanisms in the OIA and LGOIMA when appropriate to ensure they meet their statutory deadlines;
- aligns with the Chief Ombudsman's other initiatives, including the publication of OIA and LGOIMA complaints data (including the reporting of sustained delay complaints), which seeks to drive better agency performance and compliance with the OIA and LGOIMA through greater levels of transparency.

Key features of the new approach

- When the Chief Ombudsman first receives a delay complaint, his staff will contact the agency or minister to establish the facts of the matter. A response to these preliminary inquiries will be requested within **three working days**.¹
 - If the agency or minister does not respond or the response indicates that there was a delay, the Ombudsman will likely commence a formal investigation and form a provisional opinion on the complaint.
 - If the agency or minister provides evidence showing that there was no delay, the Ombudsman will likely decline to investigate the complaint on the basis that an investigation is 'unnecessary' (section 17(1)(f)(i) of the Ombudsmen Act 1975).
 - If the agency or minister provides an explanation which suggests that, in the particular circumstances of the case, it would be disproportionate to commence a formal investigation, the Ombudsman may decline to investigate the complaint on the basis that an investigation is 'unnecessary' (section 17(1)(f)(i) of the Ombudsmen Act 1975).

Circumstances where Ombudsman may decline to investigate

Cases where the Ombudsman might exercise his or her discretion not to investigate a matter include situations where the agency provides an explanation that suggests it might be disproportionate for the Ombudsman to form an opinion upholding the complaint.

This might arise where, for instance, the agency's failure to respond or to respond in time appears to have been a one-off or short-term issue, possibly due to a technical error or glitch, and the agency has already remedied that error or is actively taking steps to do so.

¹ This is shorter than the five days under the Ombudsman's previous approach, and reflects the fact it is primarily an information-gathering exercise rather than an attempt to resolve the matter.

Also relevant is whether the agency has already provided an explanation or apology directly to the complainant (and any other affected parties), where appropriate.

The key consideration here is whether an Ombudsman forming a final opinion and recommendation(s) would likely:

- Not achieve anything more for the complainant or do more to fix issues within the agency than what the agency has already done (or has undertaken to do within a reasonable timeframe);
 - Discourage agencies in a similar situation from taking appropriate remedial steps of their own prerogative in future.
- Once the Ombudsman forms a provisional opinion, the agency or Minister ordinarily will have **two weeks** to consider and comment.
 - If the agency or minister does not respond or the response indicates that there was a delay, the Ombudsman will likely form a final opinion on the complaint and consider making recommendations.
 - If the agency or minister provides an explanation which suggests that, in the particular circumstances of the case, it would be disproportionate to form a final opinion on the complaint, the Ombudsman may decline to investigate further on the basis that *'further investigation is unnecessary'* (section 17(1)(f)(ii) of the Ombudsmen Act 1975).

To ensure that repeated non-compliance or any other apparent systemic issues are identified and addressed, all delay complaints will be logged and tracked by the Chief Ombudsman and inform his monitoring of official information practices within agencies.

In addition, the number of OIA and LGOIMA delay complaints received and completed will be published on a six-monthly basis, as part of the Chief Ombudsman's ongoing publication of OI complaints data project. This approach is consistent with the Chief Ombudsman's view that transparency will drive better agency performance and compliance with the official information legislation, and help maintain public trust in government.

Timeframe

The Chief Ombudsman will implement this revised approach to delay complaints received by this Office from **1 July 2022**.