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Report of Ombudsman David McGee:

Investigation into Ministry of Education's management of OIA requests about proposed Christchurch school closures

This is the report on my investigation under section 13(3) of the Ombudsmen Act into aspects of the Ministry of Education's management of official information requests about the proposed closure of schools in Christchurch.

A handwritten signature in black ink, appearing to read "David McGee".

Dr David McGee CNZM, QC
Ombudsman
18 December 2012

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Executive Summary

Under section 13(3) of the Ombudsmen Act I decided to conduct an investigation into matters that have been publicly raised relating to the Ministry of Education's management of requests for information about the proposed closure of some Christchurch schools.

The three specific matters that are the subject of my investigation are as follows:-

1. That the Ministry advised the Christchurch City Council to refuse a request for official information on the basis that the information was not held by the Council when the Ministry knew that it was held.
2. That the Ministry advised a requester to withdraw a request for official information, suggesting that if he did so he would receive the information sooner.
3. That a number of requests for official information were refused, at least in part, on the basis that the information concerned would eventually be made public in any case.

Summary of conclusions and next steps

Issue 1:

The Ministry's responses to the Christchurch City Council were wrong. An inappropriate suggestion was made in its original response and in its subsequent responses the Ministry failed to correct or address that fact in a meaningful manner.

The Ministry has proposed reviewing its internal guidance and providing additional training for staff. I will monitor and audit these initiatives.

Issue 2:

The Ministry was wrong to advise two principals to withdraw their official information requests in order that they may receive a better response.

The Ministry has commenced action to review its Official Information Act (OIA) processes. However, in light of concerns about similar occurrences in the wider public sector, the Chief Ombudsman will commence an investigation of OIA policy and practice in selected government agencies in the New Year.

Issue 3:

The Ministry's statement that certain information would be made available after the consultation was not made to discourage OIA requests generally, but to explain its refusal to release information in response to requests that had already been made. The OIA allows requests to be refused on the basis that the information will soon be publicly available. Nonetheless, concerns remain about the adequacy and timeliness of information provided during the consultation process.

I intend to undertake an investigation into the policy and practice of the Ministry of Education regarding school closure consultations generally.

Introduction

On 25 October 2012, TV3's *Campbell Live* programme contained an item on the experience of Matthew Cox in making requests for official information to the Ministry of Education, the Canterbury Earthquake Recovery Authority and the Christchurch City Council about the proposal of the Minister of Education to close and merge a number of schools in Christchurch. The same item included an interview with a principal and deputy principal of two affected schools who expressed their difficulties in accessing information relevant to the consultation process.

I was concerned to hear about allegations made during the course of the programme regarding the Ministry's management of requests for information.

Under section 13(3) of the Ombudsmen Act I decided to conduct an investigation into three specific matters, namely:

1. That the Ministry advised the Christchurch City Council to refuse a request for official information on the basis that the information was not held by the Council when the Ministry knew that it was held.
2. That the Ministry advised a requester to withdraw a request for official information, suggesting that if he did so he would receive the information sooner.
3. That a number of requests for official information were refused, at least in part, on the basis that the information concerned would eventually be made public in any case.

I met with Ministry officials on 26 October. On 30 October the Ministry provided a report and supporting information about how it has responded to particular requests for information during the consultation process. This led me to make enquiries of the Christchurch City Council and the school principals involved in particular requests that have been drawn to my attention. This report is the result of those enquiries and further comments that I have received from the Ministry.

Issue 1: Advice to the Christchurch City Council regarding a request for information

On 2 October 2012, a Christchurch City Council staff member sent the following email to a counterpart at the Ministry:

*"CCC has received an OIA request that asks for all information the Council has from 'the Ministry of Education and/or its consultants regarding education in Christchurch'.
You have previously sent the attached presentation which was intended for a workshop on the South West and Belfast Area Plans early this year.*

Can you please advise if the information in the notes section of the presentation is confidential. [...]"

On 3 October 2012 the Ministry representative responded:

"Thanks for alerting us to the OIA request.

Please note that while the Ministry has provided this information to you we reserve the right to withhold it from other parties.

Please advise the requester that as the information is not owned by the Council you are unable to provide it.

We suggest two options for your legal team to review.

- 1. Refuse this request under section 18(g) that the information requested is not held by the Christchurch City Council.*
- 2. Transfer the request — under Section 14(b)(i), Official Information Act 1982.*

The Christchurch City Council has checked its records but does not hold the information you require. The council believes that the information is held by the Ministry of Education. Accordingly, your request has been transferred, under section 14(b)(i) of the Act, to that agency. You can expect a reply to your request, from the ministry, shortly.

You have the right to have this decision reviewed under section 13 of the Ombudsman Act 1975."

At Campbell Live's request the Secretary for Education provided the following statement that was read out on the programme:

"I have reviewed the OIA request in question, and I am completely satisfied that there was no directive to the council about what it should do, or anything unlawful in what was done.

This is simply a case of a staff member trying to provide some guidance to another organisation. There was no directive to the council, and in fact, the council was quite rightly told it should seek its own legal advice."

In its subsequent letter to me, the Ministry stated:

"The sender of the email [...] is the Regional Lead Adviser, Network. [He] is a member of the Regional Operations team and he does contribute to the gathering of information for Official Information Act (OIA) purposes. He is not a manager.

[He] received a request from planners at the Council who he is in regular contact with to support education planning. The email requested him to advise if the information being considered for release was confidential. He did seek internal advice prior to responding. Staff involved have been spoken to and the Ministry can confirm that there was no intention to persuade the Council to provide an incorrect answer to the request they had received, or to respond in any way that was inconsistent with the intention and purpose of the Act.

...

We are confident that the emails were an attempt to assist the Council with preparing a response. We understand that the view of staff involved was that this request should have been transferred to the Ministry, who were responsible for generating the information.

Since receiving the Ministry's response, and following discussions with the Council, I have been provided with a copy of additional correspondence between the Council and the Ministry. In particular, I have seen an email dated 5 October 2012 from the Council to the Ministry that reads:

"I am coordinating CCC's response to the LGOIMA request I have discussed the issue with one of the Council's solicitors.

The relevant statute so far as the Council is concerned is the Local Government Official Information and Meetings Act 1987. Section 17(g) of that Act is the equivalent to section 18(g) of the Official Information Act 1982.

The Council is entitled to refuse a request for information if it is for one or more of the reasons set out in section 17. These include, in (g), that the Council does not hold the information nor is it thought to be held by another agency. In the current situation, the Council clearly holds the information provided to it by the Ministry of Education earlier this year.

Section 12 in LGOIMA has the same effect as s.14 of OIA. The Council may transfer a request if the information is not held by the Council, but it believes that another agency does. For the same reason as above, this provision is not available to the Council.

The position is that the Council holds information provided to it by the Ministry. There was no obligation of confidence imposed on the Council in respect of the information. There do not appear to be any other grounds in LGOIMA that would prevent the Council from making the information requested available to the requester. Your e-mail makes no reference to such grounds existing.

The Council therefore intends to release the information on Monday 8 October 2012, unless sufficient reasons are provided for withholding it."

A Senior Communications Adviser from the Ministry responded to the Council on the same day. This response was copied to the Ministry's Chief Legal Adviser and other members of the Legal Services Team:

"...[T]hank you for advising us of the council's view in regards to this OIA request.

Please note that our legal opinion is as we have already indicated that this request should be transferred back to us.

We note CCC's refusal to do so appears to be based on only one part of section 12 of the LGOIMA - section 12(b)(i) due to the fact it is holding the information.

However, section 12(b)(ii) provides another ground:

Where a requestis made to any local authority and the information to which the request relates is believed by the person dealing with the request to be more closely connected with the functions of another....Department....the local authorityshall promptly, and in no case later than 10 working days after the day on which the request is received, transfer the request to thethe appropriate Department, and inform the person making the request accordingly.

This is the approach adopted by CERA in regards to the release of Ministry information and it is our preferred approach for other agencies we partner with where information owned by us is provided to support a particular purpose and is then sought by other parties.

We therefore expect that the request will be immediately transferred to us to manage the appropriate response.

Should this continue to be an issue please refer all correspondence to our legal team ..."

[emphasis in original]

The Council responded:

"I have had further discussions with ... our senior solicitor who does not share the views expressed in your email. [He] tried but was not able to contact [your Legal Services Team].

Our view is that the material concerned is legitimately material that is held by the Council and at least as closely connected to the functions of CCC as it is to the functions of the Ministry of Education. Given that this issue has been going on for some time ... we felt there was no legitimate reason to delay responding to the LGOIMA request any longer. As a consequence I have responded to the person making the request supplying the relevant information held by the Council."

Consideration

I see nothing wrong with the Ministry suggesting to the Council that the request be transferred to it. But the content of the Ministry's email of 3 October 2012 is concerning for a number of reasons. The following two sentences set the tone for the Ministry's response:

"Please note that while the Ministry has provided this information to you we reserve the right to withhold it from other parties.

Please advise the requester that as the information is not owned by the Council you are unable to provide it."

These statements are phrased more as directives than suggestions and they plainly misrepresent the proper application of the official information legislation. The subsequent suggested options are premised on the Council misadvising the requester that it does not hold the information. This, at best, reveals a misunderstanding of the definition of information "held" under the relevant legislation.

While the email, on its face, reads as an attempt to pressure the Council not to release the information on false grounds, I can accept the suggestion that the intention was not to mislead and that it simply represents a misunderstanding of the legislation. That the options were forwarded as suggestions "for your legal team to review" supports this possibility.

However, I still find the subsequent email exchange between the Council and the Ministry concerning. In that correspondence, the Council quite properly challenges the Ministry's interpretation of the legislation in the current case and seeks clarification of the Ministry's position. The Council is to be commended for the position it adopted.

The Ministry's response to the Council's concerns is signed at a senior level in the Ministry and its Legal Services Team is copied in. In that email, the Ministry continues to urge transfer in a forceful manner: "We therefore expect that the request will be immediately transferred to us to manage the appropriate response". While it amends the Ministry's position and presents a tenable basis for transfer, it fails to address the inappropriateness (whether intentional or not) of the earlier email of 3 October 2012.

My view

The Ministry's responses to the Christchurch City Council were wrong. An inappropriate suggestion was made in the original response and in its subsequent responses the Ministry failed to correct or address that fact in a meaningful manner.

Issue 2: Advice to requesters that they should withdraw their official information requests

The Ministry has responded to this issue as follows:

"The Ministry can confirm that in two instances in Christchurch there have been discussions with principals about their OIA requests for information about their school and the OIA process. Our enquiries have led us to the view that there was a pragmatic motivation behind this, rather than an attempt to try to evade the responsibilities the Ministry has under the Act.

Christchurch staff were concerned the OIA logging process may delay providing responses to schools. This was in cases, for example, where a number of questions had been asked which would require time to process and collate and where in many cases much of the information was already available and could be provided without the need for a formal request.

The Ministry has spoken with the two principals in this regard. Both principals opted to withdraw their requests to expedite the flow of information. In one case the same principal had lodged in excess of 60 specific questions with the Ministry, a number of which fell within the ambit of the OIA request.

The principals' decision to withdraw the requests expedited the release of this information across these and a range of additional enquiries. In both cases, the Ministry encouraged the principals to refile their requests should they feel the information provided had not met their request. Neither has elected to do so. A third principal has gone on record to say he would have preferred this approach.

...

This approach appears to be based on a genuine desire to facilitate the delivery of information to schools under a consultation process. It appears that the above reflects staff and sector view that the Ministry process is slow and not able to adapt to situations such as Christchurch, where local staff are seeking to engage with schools and facilitate the flow of information during a consultation process.

We believe that the Ministry OIA process is sound and one that ensures that relevant internal stakeholders are consulted before a decision is made on a request. However, the Ministry has requested Ministry of Social Development to undertake a peer review of our processes and we will undertake to consider implementing any improvements identified."

Consideration

I can see no basis in any circumstances to suggest to requesters that they withdraw their requests for information from an Official Information Act (OIA) context in order to facilitate a better response. While the Ministry states its belief that *"the Ministry OIA process is sound"*, it also acknowledges:

"It appears that the [approach] reflects staff and sector view that the Ministry process is slow and not able to adapt to situations such as Christchurch."

If this is a widely held view then either the Ministry's OIA process is not sound or there is a misunderstanding within both the Ministry and the sector about the process. In addition, I can only conclude from the Ministry's comment that *"[t]he principals' decision to withdraw the requests expedited the release of this information"*, that there is a flaw in the Ministry's OIA process, as a sound process would allow all due expedition without the need to take shortcuts. Any suggestion that a government agency must bypass the OIA in order to allow a more efficient provision of information is unacceptable. It is not possible to bypass the OIA. Any request for information held by an agency falls under the OIA whether the Act is mentioned or not.

The Ministry suggested that the affected principals were well-served by the alternative process and that a third principal would have preferred it as well. I have contacted the two principals who were invited to withdraw their requests. Both have advised that they found the process of obtaining information from the Ministry frustrating, and that they were led to believe that only by agreeing to the alternative process would they receive anything more than the barest cooperation. Both principals independently voiced their dissatisfaction with the Ministry's responses to their requests (initially and in respect of the alternative process) and it is clear that they felt disempowered as a result of their engagement with the Ministry in seeking information. I understand that the Ministry's comments about the *"third principal"* refer to Gerard Direen's appearance on *Campbell Live*. I have reviewed that interview and I note that he expressed his own displeasure with the Ministry's OIA process and then observed that, if there was indeed a more effective way of obtaining information from the Ministry, advice about that was not being shared in an equitable way.

My view

The Ministry was wrong to advise two principals to withdraw their official information requests in order that they may receive a better response.

Issue 3: Requests had been refused in part because the information would eventually be public knowledge anyway

During the *Campbell Live* item, Ann-Marie Garden of Yaldhurst Model School raised an issue regarding the Ministry's refusal of that school's request. She noted that the Ministry's refusal was premised on the assertion that release of the information would interfere with the consultation process, but that the information would be made available after the consultation.

My view

The Ministry's statement that some information would be released after the consultation process was not made to discourage OIA requests generally, but to explain its refusal to release information in response to requests that had already been made. Section 18(d) allows requests to be refused on the basis that the information will soon be publicly available. Nonetheless, the Ministry's response highlights an issue that has featured throughout the consultation process: the perception that inadequate information was released proactively at the start of the consultation process, and that attempts by affected parties to remedy the issue via the OIA have been frustrated by delays and questionable refusals.

Proposed action

Issue 1

- That the Ministry advised the Christchurch City Council to refuse a request for official information on the basis that the information was not held by the Council when the Ministry knew that it was held.

Ministry's proposed remedy

The Ministry has told me that it will undertake the following actions:

- "a) The Ministry will be running compulsory training for all Christchurch staff on the OIA and the Ministry processes for managing and responding to OIA requests. This will include advice on resources available to assist in responding to requests, such as internal Ministry guidelines, as well as referring to the material available on the Office of the Ombudsman website.*
- b) In addition, we think it would be useful to discuss whether staff from the Office of the Ombudsman would be able to assist with this training programme.*
- c) The Ministry will consider whether it needs to develop clearer guidance for all staff on the transfer process, including guidance on discussions with external parties concerning transfer of requests."*

Next steps

I agree that the Ministry's proposal is appropriate in the circumstances. I will monitor and assist with these initiatives, and audit their implementation.

Issue 2

- That the Ministry advised a requester to withdraw a request for official information, suggesting that if he did so he would receive the information sooner.

Ministry's proposed remedy

The Ministry has proposed as follows:

- "The Ministry will undertake the following actions to ensure that this situation does not arise in the future.*
- a) A reminder will be issued to all staff on the Ministry guidelines for processing OIA requests — which includes obtaining Senior Manager approval and Legal Services advice for responses to OIA requests.*
- b) The Ministry will consider whether we can bolster our current OIA advice for staff, including adding guidance for situations where part of the request can be responded to quickly when that information is readily available, leaving other parts of the request for a later response.*
- c) The Ministry will consider whether our current OIA process were flexible enough to cope with the situation such as Christchurch, and what, if any, changes could be made to assist staff if a similar situation should arise again."*

I note that the Ministry has also indicated that it intends to submit its OIA policies to the Ministry of Social Development for peer review.

Next steps

I am pleased that the Ministry has already commenced action to review its OIA processes. However, the existence within an agency of alternative processes for considering information requests that seek to avoid the protections and scrutiny of the OIA poses a threat to the integrity of the OIA itself.

While I can accept that the motivation of Ministry staff in engaging an alternative process may have been well-intentioned, the apparently common belief that this is necessary demonstrates:

- (a) a fundamental misunderstanding of the OIA by relevant staff; or
- (b) unduly inflexible and impractical agency policies for the processing of information requests; or
- (c) both.

A number of cases that the Chief Ombudsman and I have reviewed suggest that the issue is not confined to the Ministry of Education, and that there may be a broader perception within the public sector that some requests for information can only be processed efficiently by somehow removing them from the OIA context.

Therefore, the Chief Ombudsman intends to conduct an investigation of OIA processes in selected government agencies in early 2013. Such an investigation will examine whether the policies and practices of agencies under review are fit for purpose, in that they ensure timely and appropriate responses to all information requests, and that they are not circumvented in some instances.

Issue 3

- That a number of requests for official information were refused, at least in part, on the basis that the information concerned would eventually be made public in any case.

Next steps

School closures and mergers are decisions that have a major impact not just on the affected staff, pupils and parents, but on the whole communities in which the schools are based. Therefore, effective consultation is of utmost importance. I think that it is necessary to define what and when information should be released proactively to ensure that a proper, informed and fair consultation is held. Schools and parents should not have to ferret out information by making official information requests. They should be presented with the relevant information in a comprehensive and comprehensible form so that they can participate effectively in the consultation process.

In order to establish whether Ministry processes are adequate to ensure effective and sufficient consultation for school closures, it is my intention to undertake a general investigation into the policy and practice of the Ministry regarding such consultations. I will make further comment about the ambit and timing of this investigation early in 2013.

