

Request for evidentiary conclusions in respect of 15 issues or assertions and information about religious affiliation or association of staff

Legislation	Official Information Act 1982, ss 18(g), 18(h)
Agency	Health and Disability Commissioner
Ombudsman	Professor Ron Paterson
Case number(s)	343825
Date	June 2015

Information not held—evidentiary conclusions would need to be created—to the extent that if information about religious affiliation or association of staff was held in mind of Commissioner, it would be held in a personal capacity

A father made a complaint on behalf of his daughter to the Health and Disability Commissioner (HDC) about medical services she received. He was then dissatisfied with the HDC's decision to take no further action. The HDC told him that it had decided to discontinue its investigation because neither party was able to recall the details of what occurred. As such, further investigation would not clarify matters. The father submitted a number of official information requests to the HDC. He then complained to the Ombudsman about the adequacy of the HDC's response to those requests.

Request 1: Evidentiary conclusions

The HDC advised the complainant that when it took its decision not to inquire further into the complaint it had applied the evidentiary standard of the '*balance of probabilities*'.

The complainant subsequently wrote to the HDC, asking the Commissioner to explain whether, '[a]ccording to a *balance of probabilities*', 15 contended matters of fact had occurred. The HDC responded that the reasons for (and the basis of) the Commissioner's decision to take no further action on the complaint had already been provided.

Section 2 of the OIA defines ‘official information’ as information held by Ministers of the Crown and specified agencies. The key question is whether the information is ‘held’, irrespective of where it is located or in what format it is. A necessary condition of information being ‘held’ for the purposes of the OIA is that it already exists at the time of request. The OIA provides a mechanism to retrieve information that already exists, and does not generally oblige officials to create information to meet a request.

The Ombudsman noted that, in this case, the HDC expressly elected not to continue to investigate the matter due to the Commissioner’s ‘*conclusion that neither party was able to recall the details, and that further investigation would not clarify the issues*’. Consequently, it was clear that the HDC had not formed a view on whether certain matters were likely to have happened before it declined to investigate further, and the questions posed by the requester after the fact essentially amounted to an invitation to create information that did not exist.

Questions which invite an agency to create information—as distinct from questions which relate to information already held by an agency—are generally not covered by the OIA. While the OIA does contain a mechanism for requesters to ask for the rationale and relevant factors used in relation to decisions that affect them personally,¹ the OIA cannot be used to interrogate an agency about decisions it has not taken or matters which it has not considered.

In the circumstances, the Ombudsman considered the HDC had responded adequately to the request when it referred the requester back to its decision and its reasons. The OIA did not require the HDC to generate new information by expressing an opinion on each of the 15 contended matters of fact raised by the requester, which had not been earlier considered by the HDC. The only relevant official information held by the HDC at the time of the request was its previous decision not to take further action on the matter (for the reasons already given).

Request 2: Religious affiliation

The requester sought the names and number of staff the Commissioner shared a church affiliation or association with. The Commissioner categorically denied any implied impropriety in HDC appointments. He refused to supply information about the church affiliation or association of staff under sections 9(2)(a) (privacy) and 18(h) of the OIA.

In response, the requester denied that he was implying any impropriety in HDC appointments. He said he was seeking “*factual information*” held by the HDC, about the number of staff with whom the Commissioner shared a church affiliation or association. The Commissioner replied that this information was not collected by HDC, and, reiterated that it was in any event private to the individuals concerned.

The requester complained to the Ombudsman, maintaining that the information didn’t need to be collected by the HDC, since it was already in the Commissioner’s head. The Ombudsman

¹ A request made under section 23 of the OIA may require an agency to provide the requester with a written document containing certain specified information, including the reasons for a decision made, in respect of a decision that has affected the requester in their personal capacity.

noted that the church affiliation or association of staff is not needed or recorded by the HDC, acting in his official capacity. To the extent that such information is in the mind of the Commissioner, it would be held by him in a private capacity, and therefore would not be 'official information' for the purpose of the OIA.

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