

Request for official information about scholarship criteria framed as question

Legislation	Official Information Act 1982, ss 12(1AA), 13, 15, 30(1)(b); Ombudsmen Act 1975, s 22(1)(a)
Agency	Ministry of Education
Ombudsman	Peter Boshier
Case number(s)	592213
Date	22 February 2023

Failure by the Ministry of Education to respond to a request for official information within the statutory timeframe – Ministry did not process the request as an OIA request as Ministry considered that it required the generation of comment – Ombudsman considered that the request clearly involved the retrieval of information held by the Ministry rather than creation of content and, as such, was a valid request for official information – Ombudsman formed opinion that the failure to respond was contrary to law – Ministry responded to requester and apologised for delay

Background

On 12 August 2022, the Ministry of Education (the Ministry) received a request under the Official Information Act 1982 (OIA) for information about the Tuli Takes Flight Scholarships¹ that were established as part of the New Zealand government apology for the 1970s Dawn Raids.² The requester’s email included a link to a government press release about the [Tuli Scholarships](#) and stated:

I was interested in whether for the previous criteria or the upcoming criteria what consideration is given for applicants direct family connections to the dawn raids period?

¹ Tuli scholarships are available to New Zealand citizens of indigenous Pacific heritage who are 18 years old and over, and who are looking to undertake vocational or academic study or training.

² During the [1970s Dawn Raids](#), the Police were instructed to enter homes and ask for proof of a person’s right to be in New Zealand. This policy was targeted at the Auckland Pacific community

Section 15(1) of the OIA requires that decisions on requests for official information are made and communicated ‘as soon as reasonably practicable’ and no later than 20 working days after the request is received. A decision on this request was required to have been made and communicated by 9 September 2022, at the latest.

On 25 August 2022, the requester emailed the Ministry asking whether his email had been received. No response was received. On 15 September 2022, the requester complained to the Chief Ombudsman.

Preliminary inquiries and investigation

On 19 October 2022, the Ombudsman made preliminary inquiries with the Ministry.

On 26 October 2022, the Ministry confirmed that it received the requester’s emails of 12 and 25 August 2022, but it had not responded due to human error, high workloads, and capacity in the responding team. Fundamentally, the Ministry did not accept that the initial email was a valid request under the OIA, as the Ministry believed it was primarily a request for commentary rather than information. Nonetheless, the Ministry agreed to provide a response to the requester by 28 October 2022, which it did.

On 31 October 2022, the Ombudsman invited the Ministry’s comment on his provisional opinion that it had failed to comply with the requirement under section 15 of the OIA to make a decision and communicate it to the requester as soon as reasonably practicable and no later than 9 September 2022. The Ombudsman confirmed that the request was a valid OIA request, clearly seeking information about the content of the criteria for the Tuli Scholarship (namely whether the criteria included family connections to the dawn raids). The Ombudsman also noted that agencies had an obligation to provide ‘reasonable assistance’ to help requesters make requests (see section 13 of the OIA).

On 14 November 2022, the Ministry responded to the provisional opinion. The Ministry disagreed that the request was valid under the OIA, as it was framed as a question seeking an explanation rather than an information request. The Ministry noted that it had been guided by Ombudsman case note 343825 which stated that *questions seeking explanations rather than information held by an agency were not covered by the OIA*.³ The Ministry also suggested that, if the information was found in a staff member’s (subjective) memory, then translating that into writing would inevitably involve the creation of (objective) information. This was described by the Ministry as a process of generation and therefore not covered by the OIA. The Ministry agreed to review the logging and management of incoming correspondence by the relevant team. However, the Ministry maintained its position that the request was not a valid OIA request.

On 22 February 2023, the Ombudsman finalised his opinion that the Ministry had failed to meet the relevant statutory obligations under the OIA. The Ombudsman highlighted that

³ [Ombudsman case note 343825](#) has since been amended to highlight that the form of the request is not determinative of its validity.

obtaining requested information from an official's memory is an exercise in retrieval for the purposes of the OIA. The process of translating it into writing merely alters its format, and does not constitute the creation of new information. The Ombudsman cited the Supplementary Report of the Danks Committee in identifying that:

For the purposes of the Bill information includes not merely recorded data but knowledge of a fact or state of affairs by officers of the agency in their official capacity, e.g., when a particular report is to be presented. Note however that to constitute "official information" it must be "held" by the agency, or vicariously by one of its officers or employees.

The Ombudsman observed that case note 343825 confirmed that that 'information held by an agency' is covered by the OIA. However, he updated the case note to highlight the distinction between the 'creation of new information' versus the 'retrieval of pre-existing information', and to make it clearer that framing a request as a question does not necessarily mean that it is not a request for official information.

The key consideration is whether the question can be answered by providing information that is already held by the agency. That can include information held in an official's memory. In this case, it was clear that the requester was seeking information (framed as a question) from the Ministry about the Tuli scholarships. It transpired that the information requested was known to members of the Tuli scholarship team, but not translated into writing prior to the request.

Outcome

The Ombudsman formed the final opinion that the Ministry failed to meet the statutory obligations imposed by the OIA. In doing so, the Ministry failed to make and communicate a decision on the request as soon as reasonably practicable and no later than 20 working days after the request was received, as required by section 15(1) of the OIA. The failure to meet these statutory obligations was contrary to law (section 30(1)(b) of the OIA and section 22(1)(a) of the Ombudsmen Act 1975).

The Ombudsman did not make any recommendations, as the Ministry had adopted new tracking methods to prevent the issue that led to the delay from occurring again, and had apologised and provided the requested information to the requestor. The Ombudsman reported his final opinion to the Minister of Education.

Commentary note

This case note highlights how the receipt of a valid request for official information triggers the relevant statutory obligations under the OIA. It is also important to note that general principles of good administration and fairness that apply to public agencies co-exist with more specific legislative obligations. This means that even if the email had not been a valid OIA request, and the statutory timeframes were not triggered, there still would have been a commensurate obligation on the Ministry to respond in a reasonable manner. In that situation, the Ministry's

response would be a matter that the Ombudsman has authority to investigate under the Ombudsmen Act.

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.