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## *Editorial*:

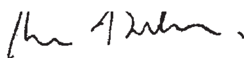
# Public Registers, Privacy and the OIA

Public registers are generally established under enactments that set out what information can be accessed, by whom, and in what manner. Not all public registers are administered by agencies subject to the OIA but many are. In these circumstances, although information held on the public register may be official information, ultimately access is determined by the operation of the enactments establishing the register. It is not a case of the OIA "requiring" release of the information.

Where access is not authorised or required or otherwise regulated by a separate enactment, requests for information held on a public register subject to the OIA must be considered under that Act. If there are valid concerns that access would prejudice personal privacy, section 9(2)(a) of the OIA provides good reason for refusal, except where the interest in protecting privacy is outweighed by other considerations favouring disclosure in the public interest. We are therefore surprised and concerned that some agencies are labouring under the incorrect perception that the Ombudsmen have "ruled" that official information held on public registers must always be made available on request in all cases. No such view has ever been expressed.

Where the OIA applies, the test under section 9(2)(a) allows an intelligent judgement to be made between competing interests in particular cases. It is important to note that by their very nature, public registers will invariably contain information that citizens may properly seek in pursuing fair determination of their own individual rights. Protection of an individual's personal privacy is an important interest in contemporary New Zealand society, but it should not arbitrarily prevail over the legitimate interests of other individuals.

In respect of some public registers, there may well be a need to review existing legislation to provide a better basis for assessing competing privacy and public interest considerations. However, simplistic amendments that exclude the ability to make intelligent, sensible judgements on the merits of individual cases should be avoided. Such amendments would not only undermine the principles and purposes of the OIA but would also erode the rights of individual citizens in a free democratic society.



John Belgrave
Chief Ombudsman

Beverley Wakem
Ombudsman

# Mel Smith retires

MR MEL SMITH has retired as an Ombudsman after serving a four year term.

Born in Hawera, most of Mr Smith's working life was spent in the Department of Justice in a variety of roles, including Chief Inspector and later Secretary for Justice in 1995 when the Department was being restructured. He also spent four years as Deputy Secretary of Internal Affairs. From 1996 to 2001, he was a self-employed consultant specialising in public service projects.

Mr Smith has had a long private involvement in Maori affairs and was the founding Chairman and is the current Patron of Arts Access Aotearoa, an organisation that works to involve elderly people, refugees, disabled people and prisoners in the arts.

One of Mr Smith's last functions as an Ombudsman was to complete, with Chief Ombudsman John Belgrave, an own-motion investigation of the Department of Corrections' current practices and procedures with regard to the detention and treatment of prisoners. The own-motion investigation is discussed, in more detail, below.

Mr Smith's report on leaving office was tabled in Parliament in November 2005 and can be read at *www.ombudsmen.govt.nz*.

We wish Mr Smith well in his retirement.

## OIA - unreasonable to charge to cover costs of inefficiencies

IT IS NOT reasonable to impose a charge for the supply of information under the Official Information Act (OIA) in order to recover costs due to administrative inefficiencies.

With a recent complaint about a charge to be imposed for official information, the Ombudsman formed the view that it would not be reasonable to pass on to the requester (a Member of Parliament) extra costs incurred because the information related to a section of a department that no longer existed.

The department argued that the disestablishment of the section meant there was a loss of institutional knowledge and that, in order to overcome this problem, it would have to employ contractors with expertise in the OIA and Ministerial servicing at $123.75 an hour after the first hour, instead of $76 an hour after the first hour as outlined in the Ministry of Justice *Charging Guidelines*.

However, the Ombudsman considered that the requester should only have to meet costs comparable to those that would reasonably be charged by a properly-functioning administrative organisation, where the processing of official information requests is a core output and funded accordingly.

Clearly, this particular section was not functioning at all, but it was also apparent that before its demise its administrative processes had been less than robust - with an extremely old and unstable electronic data base, without a search function, that was incomplete and inconsistent with corresponding paper files.

The *Guidelines* contemplate that a higher charge may be applicable *"... where staff with specialist expertise who are not on salary are required to process the request ..."* (paragraph 3.2).

However, in this case, it emerged that the *"specialists"* would be required more as an extra pair of hands, given the overall pressures on a department that already possessed the requisite expertise but in insufficient quantities to cope with the request.

# Rating and Relationship Property

THE WAY IN which ownership of property is registered may have implications for the rating of that property.

A complaint was received under the Ombudsmen Act that a district council had wrongly declined to accept that two properties were in common ownership for the purposes of the Local Government (Rating) Act 2002 (*the Rating Act*).

The complainant explained that he and his wife owned two properties which were next to each other and used as a single property. The complainant was the registered owner of the first property and he and his wife were the registered owners of the second.

Section 20 of the Rating Act provides that two or more rating units must be treated as one unit for rating purposes if they are owned by the same person or persons, are used jointly as a single unit, and are adjoining.

The council argued that, because the registered owners of the two properties were not identical, there was no common ownership and the properties had to be rated separately.

The Ombudsman observed that the definition of ownership in the Rating Act was not limited to the "*registered*" owners of property but also included a person who is "*entitled to any estate or interest in land constituting a rating unit*."

The Ombudsman also observed that the Property (Relationships) Act 1976 (PRA). It applies the principle of equal sharing to "*relationship property*", which appeared to provide the complainant's wife with an interest in the first property.

Moreover, section 4 of the PRA makes it clear that the PRA is a code. It requires any questions relating to relationship property to be decided as if they had been raised in proceedings under the PRA.

In these circumstances, the Ombudsman formed the view that the wife was not necessarily excluded from being a co-owner with her husband of the first property and that, therefore, the two properties should be treated as one rating unit.

The council did not agree with the Ombudsman's view on the legal position but, given the relatively unusual circumstances, it agreed without prejudice to treat the two properties as a single rating unit. The complaint was resolved on this basis.

# School Bullying Survey

A REQUEST FOR information on a survey of bullying carried out at a high school led to a complaint from a journalist to the Ombudsmen under the Official Information Act (*OIA*).

The survey had been carried out as part of the Eliminating Violence Programme run by the Ministry of Education.

Some information had been provided to the journalist but a document reporting on the results of the survey was withheld on a number of grounds, including section 9(2)(ba)(ii) of the OIA. This section applies if:

(i) the information is subject to an obligation of confidence; and
(ii) making the information available would be likely otherwise to damage the public interest.

The Ombudsman formed the view that section 9(2)(ba)(ii) applied to the information at issue. Undertakings of confidentiality had been given to the school when it participated in the survey. Staff and students had been advised that, while the results of the survey would be reported in a collated way to the school, no information about the survey would be made public.

The Ombudsman was also of the view that making the survey results available would be likely to damage the public interest. The Ombudsman was satisfied that the continuing use of the voluntary Eliminating Violence Programme was in the public interest as it had been found to be effective in reducing violence in schools and that release of the information would discourage other schools from participating in it.

However, this was not the end of the matter. Even though section 9(2)(ba)(ii) applied, it was necessary to go on to consider whether there were any countervailing public interest considerations favouring disclosure of the information that outweighed the reasons for withholding.

The Ombudsman considered that there was a countervailing public interest in the release of information about the results of the survey so that the wider community, particularly parents contemplating sending their children to the school, could be made aware of the results and the performance of the school.

The Ombudsman was of the view that these public interest considerations could be met by the release of a general statement about the outcome of the survey, rather than by the release of the survey results document in its entirety.

The Ministry agreed to release a general statement and the complaint was resolved on this basis.

## Own Motion Investigation - Department of Corrections

ON 22 DECEMBER 2004, the Ombudsmen (John Belgrave, Anand Satyanand and Mel Smith) announced that they intended to undertake an own-motion investigation of the Department of Corrections' current practices and procedures with regard to the detention and treatment of inmates.

Following the retirement of Mr Satyanand in February 2005, the investigation was continued by Mr Belgrave and Mr Smith and was completed on 2 December 2005. The report of the investigation was tabled in the House of Representatives on 13 December 2005.

The Ombudsmen's decision to undertake the own-motion investigation was prompted by a number of factors, including:

- previous investigations by the Ombudsmen of complaints about the establishment and operation of the Behavioural Management Regime (BMR) at Auckland Prison (Paremoremo) and subsequent High Court proceedings by individuals who had been made subject to the BMR;

- the publication of a report by Ailsa Duffy QC regarding the Canterbury Emergency Response Unit; and

- the continuing high number of complaints made to the Ombudsmen by prisoners.

The investigation did not involve a consideration of specific individual complaints but examined the Department of Corrections' current policies and practices. During the course of the investigation, the Ombudsmen visited a number of prisons throughout the country and formally interviewed approximately 65 prisoners and staff members.

In summary, the Ombudsmen's conclusions were as follows:

- The Ombudsmen found neither systemic ill-treatment of prisoners nor abuses of power as were reflected in the BMR and the report upon the Canterbury Emergency Response Unit. Nevertheless, a number of detailed recommendations were made for Parliament to consider.

- It became apparent during the investigation that there was a lack of meaningful occupation for prisoners in terms of employment, training, physical exercise and general recreation. Recommendations were made that the Department of Corrections review the provision of such facilities with a view to their extension.

- The Ombudsmen concluded that the policy of the Department was unduly restrictive with regard to the timing of rehabilitative programmes for prisoners, and that there was a particular shortage of drug and alcohol abuse programs.

- The handling of lost or damaged property claims by prisoners has been a substantial problem for a considerable period of time. The Ombudsmen considered that the present record keeping of the Department on property claims could be improved significantly. They recommended that the Department continue with an existing review of property handling procedures, and establish an effective national system.

- The Ombudsmen were of the view that dental services for prisoners fell below the standard that should be expected. They recommended a review.

- Without giving a full list, other recommendations related to the provision of telephones for prisoners, cell temperatures, disclosure of information on prisoner records to the prisoners concerned, and provision of dining facilities.

*A full copy of Mr Belgrave and Mr Smith's report can be found at:* **www.ombudsmen.govt.nz.**