

1. ROLE OF AN OMBUDSMAN ON REVIEW

This part of the guidelines describes the role and functions of an Ombudsman. For those who are unfamiliar with the processes of an Ombudsman's investigation and review under the OIA, chapter two provides guidance specifically tailored for agencies and a separate document "*Official Information – A Guide for People who want Information from Central or Local Government*" provides guidance specifically tailored for requesters.

This chapter addresses the following topics:

- ❖ What is an Ombudsman?
- ❖ What are an Ombudsman's functions under the official information legislation?
- ❖ How are investigations conducted?
- ❖ What form do investigations take?
- ❖ What happens during an investigation?
- ❖ What happens at the end of an investigation?

What is an Ombudsman?

An Ombudsman is an independent person appointed by the Governor-General on the recommendation of the House of Representatives to:

- ❖ investigate the acts, omissions, decisions and recommendations of or by central and local government departments and organisations (under the OA 1975);
- ❖ investigate decisions made by Ministers of the Crown, central government departments and organisations, local government organisations and other organisations subject to the Acts on requests for official information (under the OIA and LGOIMA);
- ❖ provide information and guidance about, and receive protected disclosures under, the Protected Disclosures Act 2000.

These guidelines only discuss the role of an Ombudsman in relation to investigations involving requests for official information.

There are two Ombudsmen at present: a Chief Ombudsman and an Ombudsman. Both Ombudsmen are equal. Each operates independently in respect of the investigations which he or she is conducting. No Ombudsman has the power to oversee the operations of another Ombudsman regarding an investigation. The additional functions of the Chief Ombudsman relate to the management of the office and the division of work between the Ombudsmen.

What are an Ombudsman's functions under the official information legislation?

Sections 28 and 35 of the OIA describe an Ombudsman's functions under that Act. An Ombudsman may only conduct an investigation and review under the OIA if a complaint is made to an Ombudsman in writing.¹

Section 28 – requests for official information

Section 28 provides that an Ombudsman may investigate and review any decision made by an agency which:

- ❖ refuses to make official information available to any person in response to a valid² request;³
- ❖ decides:
 - ♦ in what manner⁴ a request is to be granted; or
 - ♦ what charge is to be made for the release of information;⁵
- ❖ imposes conditions on the use, communication or publication of information made available in response to a valid request;⁶

¹ Section 28(3) OIA; section 27(3) LGOIMA

² A "valid" request is a request made in accordance with section 12 of the OIA

³ Section 28(1)(a) OIA; section 27(1)(a) LGOIMA

⁴ In terms of section 16 or 17 of the Act. These sections provide for the release of information in various formats – for example, by way of summary or with deletions.

⁵ Section 28(1)(b) OIA; section 27(1)(b) LGOIMA

- ❖ refuses to confirm or deny the existence of information, under section 10⁷ of the Act;⁸ and
- ❖ extends the time limit for providing a response to a valid request.⁹

The following events will, for the purposes of section 28(1), be deemed to be a refusal to make available the information requested:

- ❖ a failure to respond to a valid request within 20 working days of having received the request (or, where the time limit has been extended, by that time limit as so extended);¹⁰ and
- ❖ undue delay in making official information available in response to a request for that information.¹¹

Transfer of requests, urgent requests

The official information legislation does not provide an Ombudsman with authority to investigate complaints about:

- ❖ the transfer of a request; or
- ❖ the failure to respond to a request with the urgency sought.

Nonetheless, there are rules¹² for a Minister or agency who has transferred a request. Under the OA, an Ombudsman may investigate a complaint that an agency has transgressed those rules. As Ministers of the Crown are not subject to the OA, an Ombudsman cannot investigate such complaints about a Minister's decision.

Section 35 – requests made pursuant to Parts III and IV

Parts III and IV of the legislation provide for:

- ❖ a (limited) right of access to internal rules affecting decisions;¹³
- ❖ a (limited) right of access by persons to reasons for decisions affecting that person; and
- ❖ a (limited) right of access to personal information by bodies corporate.

Section 35¹⁴ provides that it shall be a function of the Ombudsmen to investigate and review any decision made under Part III or IV of the Act.¹⁵

⁶ Section 28(1)(c) OIA; section 27(1)(c) LGOIMA

⁷ Section 8 LGOIMA

⁸ Section 28(1)(d) OIA; section 27(1)(d) LGOIMA

⁹ Section 28(2) OIA; section 27(2) LGOIMA

¹⁰ Section 28(4) OIA; section 27(4) LGOIMA

¹¹ Section 28(5) OIA; section 27(5) LGOIMA

¹² Sections 14 and 18(g) OIA; sections 12 and 17(g) LGOIMA

¹³ Where those decisions are made in respect of any person or corporation in that person or corporation's personal capacity.

¹⁴ Section 38 LGOIMA

¹⁵ An Ombudsman is not, however, allowed to investigate a decision made under section 10 of the Act (section 8 LGOIMA) in relation to a request made under Part III or IV (section 35(1)(b) OIA; section 38(1) LGOIMA).

How are investigations conducted?

An Ombudsman's investigation is conducted in an impartial and non-adversarial way. An Ombudsman is not an advocate for either the complainant or the agency concerned.

All investigations are conducted in private. The OA requires Ombudsmen and their staff to "*maintain secrecy in respect of all matters that come to their knowledge in the exercise of their function*".¹⁶ The only exceptions to this secrecy requirement are where an Ombudsman is of the opinion that:

- (a) matters ought to be disclosed for the purposes of an investigation;¹⁷
- (b) a report should be published on any particular investigation or investigations under the authority of the Ombudsmen Rules 1989;¹⁸ or
- (c) matters ought to be disclosed to establish the grounds for his or her conclusions and recommendations.¹⁹

The Ombudsmen and their staff respect the privacy of individuals, but do not investigate anonymous complaints.

What form do investigations take?

Notification requirements

Before commencing any investigation, an Ombudsman is required to notify the chief executive or principal administrative officer of the agency concerned, of his or her intention to undertake an investigation.²⁰

However, in appropriate cases, an Ombudsman may ask a member of the investigating staff to approach an agency informally and seek to resolve a matter without the need for a formal investigation. This approach may be appropriate where:

- ❖ a complaint concerns a delay or a failure of an agency to respond to a request; or
- ❖ an element of urgency is involved.

Preliminary consideration by Ombudsman

Upon receipt of a complaint against an agency subject to the official information legislation, an Ombudsman²¹ will decide:

- (a) whether the complaint should be investigated formally, in which case the agency concerned will be notified accordingly;

¹⁶ Section 21(2) OA. This applies to investigations conducted under the OIA and LGOIMA by virtue of sections 29 and 35 of the OIA and sections 28 and 38 of LGOIMA.

¹⁷ Section 21(3) OA

¹⁸ Section 15(2) OA; Regulation 2 Ombudsmen Rules 1989 (SR 1989/64)

¹⁹ Section 21(4) OA

²⁰ Section 18 OA, which applies to official information investigations by virtue of sections 29 and 35 OIA and sections 28 and 38 LGOIMA

²¹ Or a member of staff to whom the Ombudsman has delegated the power

- (b) whether the complaint appears capable of informal resolution, in which case an informal approach will be made to the agency concerned;
- (c) whether further clarification needs to be sought from the complainant to enable an Ombudsman to decide whether or not there is a valid ground of complaint for investigation; or
- (d) whether, having regard to the particular circumstances of the case, informal enquiries should be made of the agency concerned to try to gain a clearer understanding of the issue raised by the complainant to enable an Ombudsman to decide whether or not there is a valid ground of complaint for investigation.

In some cases, extensive preliminary enquiries may need to be made before an Ombudsman decides to investigate a matter. Once an Ombudsman decides to formally investigate and review a complaint, he or she will notify the agency concerned.

Before deciding whether or not to investigate a complaint, an Ombudsman will also consider whether there are any circumstances which allow him or her to decline to investigate the complaint.²² Section 17 of the OA provides that an Ombudsman may decline to investigate a complaint if:

- (a) it appears that under the law or existing administrative practice there is an adequate remedy or right of appeal to which it would have been reasonable for the complainant to resort; or
- (b) the complainant has known about the matter for more than 12 months;
- (c) the subject-matter of the complaint is trivial;
- (d) the complaint is frivolous or vexatious or is not made in good faith; or
- (e) the complainant does not have a sufficient personal interest in the subject matter of the complaint.

Notifying a complaint

When an Ombudsman notifies an agency of his or her intention to investigate a complaint, an Ombudsman will:

- ❖ convey the complaint as expressed by the complainant;
- ❖ ask the agency to provide a report in response to the complaint; and
- ❖ where information has been withheld, ask for a copy of the withheld information.

Consistent with the role of an independent and impartial authority, at this preliminary stage an Ombudsman will not normally form any views as to the merits of the complaint. However, if the circumstances of a particular complaint are identical to those relating to a previous complaint, an Ombudsman will likely invite the complainant or agency to comment on why the outcome should differ in the later case.

²² Section 17 OA. This applies to official information investigations by virtue of sections 29 and 35 OIA; section 28 and 38 LGOIMA

What happens during an investigation?

Each complaint is allocated to an investigating officer, who assists the Ombudsman responsible for the investigation. The Ombudsman and/or the investigating officer will make such enquiries as are necessary to enable the Ombudsman to form an independent view as to the merits of the decision that has been complained about.

Where a request for information has been refused (in whole or in part), an Ombudsman will consider:

- (a) the agency's report as to the reasons why it was considered necessary to refuse the request;
- (b) any submissions provided by the requester; and
- (c) the information that has been withheld.

An Ombudsman will then make an independent assessment as to whether the requirements of the OIA have been met by the agency when refusing the request.

Once an assessment has been made, an Ombudsmen will form a 'provisional view' which is put to the relevant parties for comment before any final views are formed.

What happens at the end of an investigation?

If the complaint is not resolved during the course of the investigation, an Ombudsman will convey his or her final views on the merits of the complaint to all parties. Where an Ombudsman forms the final view that the complaint cannot be sustained, that is the end of the investigation.

Where an Ombudsman forms the view that the complaint can be sustained, depending on the facts of the case, he or she may recommend remedial action. If an Ombudsman considers that information should not have been withheld, it is not the Ombudsman who releases the information. In such cases, the Ombudsman recommends to the agency that it release the information at issue in accordance with section 30 of the Act.

Section 30 provides that:

- “(1) Where, after making an investigation of a complaint under section 28 of this Act, an Ombudsman is of the opinion –*
- (a) That the request made in accordance with section 12 of this Act should not have been refused; or*
 - (b) That the decision complained of is unreasonable or wrong or is otherwise a decision to which subsection (1) or (2) of the Ombudsmen Act 1975 applies, -*
- the Ombudsman shall, subject to subsection (3) of this section, -*

- (c) *Report his opinion and his reasons therefor to the appropriate Department or Minister of the Crown or organisation; and*
 - (d) *Subject to section 31²³ of this Act, make such recommendations as he thinks fit; and*
 - (e) *Give to the complainant –*
 - (i) *A copy of his recommendations (if any); and*
 - (ii) *Such other information as he thinks proper.*
- (2) *The Ombudsman shall also –*
- (a) *In the case of an investigation relating to a Department or organisation named in Part I or Part II of the First Schedule to the Ombudsmen Act 1975, send a copy of his report and recommendations to the Minister concerned; and*
 - (b) *In the case of an organisation named in the First Schedule to this Act, send a copy of his report and recommendations to such Minister of the Crown as he considers appropriate.”*

Where an Ombudsman makes a recommendation in accordance with section 30(1), a public duty to observe that recommendation is imposed on that agency from the commencement of the 21st working day after the day on which that recommendation is made, unless before that day:

- (a) in the case of the OIA, the Governor-General, by Order in Council, otherwise directs; or
- (b) in the case of the LGOIMA, local authority, by resolution made at a meeting of that local authority, decides otherwise and records that decision in writing.

A copy of the Order in Council or the decision must be given to the Ombudsman.

In the case of the OIA, every Order in Council:²⁴

- ❖ must set out the reasons for the decision and the grounds in support of the decision; and
- ❖ shall be published in the Gazette.

In the case of the LGOIMA, every such decision made by a local authority:²⁵

²³ Section 31 provides that in certain circumstances the Ombudsman shall not recommend that the information be made available. For this section to apply:

- ♦ The Prime Minister must certify that release of the information would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand or any interest protected by section 7 of the Act; or
- ♦ The Attorney-General must certify that release of the information would be likely to prejudice the prevention, investigation, or detection of offences.

²⁴ Section 32 OIA

²⁵ Section 33 LGOIMA

- ❖ must set out the reasons for the decision and the grounds in support of that decision;
- ❖ the source and purport of any advice on which the decision is based;
- ❖ be published in the Gazette; and
- ❖ be publicly notified within the district of that local authority as soon as practicable after it is made.

An Order in Council or a decision by the local authority directing that the information not be released may be made for:

*“all or any of the reasons for the decision reviewed by the Ombudsman (being reasons that were before the Ombudsman when the recommendation was made) **but for no other reasons**”.* [Emphasis added]

Where an Order in Council or a decision by the local authority directs that the information should not be released, the person who made the request may apply to the High Court for a review of the making of that Order in Council or of that decision. In such a case, unless the High Court is satisfied that such an application has not been reasonably or properly brought:

“it shall, in determining the application and irrespective of the result of the application, order that the costs of the applicant on a solicitor and client basis shall be paid by the Crown [or the local authority]”.

An Ombudsman does not have any involvement in the requester’s application for judicial review.

An Ombudsman does, however, have the ability to report an agency to Parliament if it does not comply with a recommendation.