

Editorial

**TIMELY ACCESS TO OFFICIAL
INFORMATION -
A FUNDAMENTAL GOAL**

The concern is often expressed by users of the Official Information legislation that it takes longer than they believe necessary to obtain information requested under the Act, thereby rendering the information less useful. I commented on this in an earlier issue (Vol.1, Issue 2, June 1995)

In recent months, there has again been an increase in the number of complaints to my Office about the timeliness of responses to requests, particularly requests for information under the Official Information Act 1982. Indeed, one complainant who uses the Act regularly has commented:

“For some time now, I have been concerned that Ministers and officials are abusing the Official Information Act by ignoring [s.15] which requires responses to Official Information Act requests to be provided ‘as soon as reasonably practicable’. In many instances they appear to use the 20 working day maximum as the minimum.”

In these circumstances, it is timely once again to emphasise the statutory obligation to make decisions on requests for official information and advise requesters accordingly “as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received”, except in limited cases where it is reasonable to extend the maximum time limit on grounds recognised by the legislation. It was never intended that the 20 working day maximum should come to be treated as the usual and expected time frame for response. This was clearly reflected in concerns expressed during the select committee process and later parliamentary debates on the Official Information Amendment Act 1987, which introduced the statutory time limits for response. Indeed, during the third reading debate, which like the earlier debates was bipartisan in nature, the present Attorney-General, Hon Paul East, said:

“The provision of 20 working days must be the absolute maximum, because it would be easy for a government department to specify 20 working days in its manual and for that period to become normal rather than the exception. It

should be placed on record that Parliament expects requests for official information that are made to government departments to be treated urgently within a matter of days, not weeks, and that the legislation will again be reviewed if there should be any attempt to make that maximum period of 20 working days normal.

...I must point out that it is important to ensure that official information is dealt with quickly. News about a major Government initiative that happened weeks before is stale, and an opportunity of persuading those who make policy to vary it could be lost if an initiative is not taken at the earliest possible opportunity. That is why official information should be made available quickly”

[1987, Hansard, No 33, p7075.]

Clearly in the period between the run-up to the general election and the formation of the new government, some backlog may have developed for departments and organisations which receive a significant number of official information requests. However, now that this period when extra demands may have been made has passed, all those subject to the legislation need to focus closely on meeting the statutory obligations for timely responses. My colleague and I endeavour to do what we can to ensure that these statutory obligations are both properly understood and met.

The fundamental public policy purpose of the legislation is to increase progressively the availability of official information, thereby enhancing respect for the law and promoting the good government of New Zealand. The primary responsibility for meeting the spirit and intent of the Official Information regime rests with the organisations and individuals holding the information requested. While significant progress has been made with the amount of information being released under the Act, an improvement in the time taken to respond to requests is clearly called for. The Act provides the guidelines for this; the response should be as soon as reasonably practicable.



Sir Brian Elwood
Chief Ombudsman

"Gross Misconduct" Must Be "GROSS"

What constitutes "gross misconduct?" Several students were disciplined for involvement in a marijuana-related incident. One was expelled, and complained that the decision was unreasonable and improperly discriminatory.

The Education Act, 1989, requires that before a decision can be made to suspend and/or expel a pupil, the student's action must constitute "gross misconduct" or "continual disobedience," and be a harmful or dangerous example to other fellow students.

The question as to whether a particular activity constitutes "gross misconduct" was defined by Justice McGechan in M & R v D A Syms and the Board of Trustees of Palmerston North Boys' High School (CP 304 and 303/90; High Court, Palmerston North December 7 1990) and must be determined against all the circumstances of the case.

That case established that the matter had to be tested by the character of the act and its potential to warrant the exclusion of a pupil from a school. The assessment required under the Act was that the misconduct was "striking and reprehensible to a high degree so as to warrant removal," notwithstanding the risk of personal damage to the student.

The relevant circumstances to be weighed in this case were:-

- The student "bunked" off class with other students. He denied knowing the group had marijuana. One of the other students was found in possession of marijuana.
- There was no recorded evidence that the student was in possession of or using marijuana.
- The other students in the group received three-day suspensions except for the student found in possession, who received a one-week suspension and 30 hours of community service.
- The student's work and attitude had improved markedly, which was acknowledged by the principal.
- The student was at a critical stage in tuition, and attendance was necessary to comply with the minimum requirements for sixth form certificate.

The Ombudsman concluded that the standards required by the statute and as interpreted by the High Court for "gross misconduct" had not been met. The school board agreed to re-enroll the student.

A Few Seeds Were Not a Drugs Bust...

A Swedish complainant had difficulty gaining entry to New Zealand and the Ombudsman undertook an urgent investigation.

Upon arrival on a flight from Britain, he was searched and a few cannabis seeds were found at the bottom of the complainant's bag. He claimed the seeds were not his and that he was unaware they were in his bag. The police decided not to lay a charge due to the small quantity involved.

However, he was denied entry to New Zealand as the Immigration Service believed he was like to offend against the Crimes Act, 1961, or the Misuse of Drugs Act, 1975.

After discussions with immigration officers at the airport, the complainant was advised he could fly to Fiji and there request a special direction to allow him to enter New Zealand. He duly did so, but his request was declined by the Immigration Service in Suva.

A further request was made, with the complainant providing information that his bag had been borrowed from a friend. This request was also declined. The Minister of Immigration was approached but he refused to consider a request for special direction.

A complaint was then made to the Ombudsman, by which time the complainant was in a desperate situation, having been alone in Fiji for a month with limited funds on which to survive. An immediate investigation was conducted.

As a result, the Immigration Service offered to reconsider the request for a special direction as it did not seem that all relevant factors had been taken into account. The request was reconsidered and a relieved complainant arrived in New Zealand about six weeks after he was first refused entry.

NOT ALL HEALTH INFORMATION IS PRIVATE

Ombudsmen often deal with complaints relating to official information requests for health information about third parties, and invariably have to consider section 9(2)(a) of the Official Information Act, which provides a basis for withholding information on privacy grounds.

Successive Ombudsmen have long recognised that strong privacy interests attach to health information. This is also the view of the Privacy Commissioner, with whom an Ombudsman must consult in such a case. Consequently, in most cases where health information is the issue, section 9(2)(a) has been considered good reason for refusing the request.

In reaching these views it has been noted that the public interest in disclosure would have to be particularly strong to outweigh the privacy interests. Nonetheless, cases do arise where the public interest in disclosure is seen to outweigh the privacy of the individual, as in the following case:-

Recently, a person convicted of a crime sought information from a Crown Health Enterprise. The offender wished to know whether the hospital had any record of a person being treated for certain injuries within a specified period.

The victim of the offence had given evidence at the offender's trial that she had been treated for such injuries during the period in question.

The request was made with a view to facilitating a petition to the Governor-General, pursuant to section 406 of the Crimes Act. The requester considered he was entitled to have any information which supported the claim of unjust conviction.

The hospital advised that there was no record of the victim, or of anyone else, having been treated for the type of injury said to have been inflicted. There was also no record of the victim being treated for any other condition.

Taking this into account, and the fact that the victim had given contradictory evidence in a later case, the Chief Ombudsman concluded that the public interest in disclosure of the information outweighed the privacy interests of the victim. The interests of justice required the information be made available so the Governor-General could be given the relevant facts. The CHE agreed, and disclosed the necessary information.



NEED TO BE CLEAR

How an organisation communicates with members of the public is important in the impression it conveys about itself. In some circumstances it may mean the difference between a complaint to an Ombudsman or not. Recently, a complainant whose complaint was resolved wrote afterwards:-

“Thank you very much for your patient [investigation] to obtain the information which I was entitled to receive. I greatly appreciate your efforts.

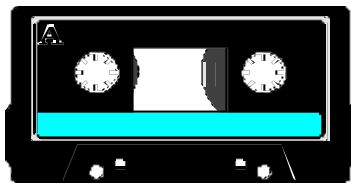
“Without your expert and fair-minded insistence on this matter I have no doubt that I would have received no satisfaction from the [organisation]. I admire the clarity and precision of your correspondence with the [organisation] which is in marked contrast with the apparently disingenuous attempts by them, in convoluted and ambiguous language, to withhold information from me.”

The complainant's comments, while flattering to the Ombudsmen, demonstrate that there can be a benefit from explaining reasons for a decision fully and clearly.

POLICE VIDEOTAPES NOT PUBLIC

A newspaper asked the police for a copy of their videotaped interviews with a person suspected of criminal offences, under the Official Information Act. By the time the request was made, the suspect had already been charged, pleaded guilty and been sentenced.

The police withheld the videotapes, relying on section 9(2)(a) of the Official Information Act, which protects the privacy of individuals.



The Ombudsman agreed, saying that statements made by suspects to the police were inherently private to those individuals, and it was reasonable for such people to expect that such records would not be made available to the public - save as might be appropriate for the purpose of any court proceedings.

The wording of the usual police warning to suspects - informing them that they were not obliged to say anything, but anything they did say might be used in evidence - seemed to emphasise that.

The Ombudsman also took into account Privacy Principle 11 of the Privacy Act, which limits the disclosure of personal information and which indicates that the purpose of obtaining the information should be considered.

In this case, the Ombudsman considered that the essential public interest in the proper publication of the circumstances surrounding the incident had been met by the criminal proceedings, which were held in open court and which had already received some publicity.

No public interest in the publication of the interview tapes themselves was perceived. The Ombudsman considered this would serve only to gratify individual curiosity.

The suspect in question had been a Government agency employee, but his criminal conduct related to behaviour in his private capacity and did not involve misfeasance towards the public. Thus the Ombudsman decided that disclosure of the videotapes was not required to satisfy the need for accountability of public servants.

Conversely, the Ombudsman considered that disclosure would be against the public interest in that persons suspected of crime in the future might be discouraged from being frank to the police for fear that their statements might be publicised.

In the circumstances, the Ombudsman concluded that disclosure of the videotapes would infringe the privacy of the suspect. The Privacy Commissioner agreed with this view.