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Editorial

Application of Official Information legislation to non-documentary information

In several recent cases, organisations have questioned whether the Official Information legislation applies to information which is not recorded in writing. In these cases the information requested did not exist in documentary form.

In our view, the definition of official information includes not only recorded data but also knowledge of a particular fact or state of affairs held by officers in a named organisation or Department in their official capacity, when that organisation or Department is subject to Official Information legislation.

The logical starting point for any consideration of what constitutes “official information” for the purposes of the official information legislation must be *Commissioner of Police v Ombudsman* [1985] 1 NZLR 578 (HC) and [1988] 1 NZLR 385 (CA), as this was the first time the Official Information Act came before the Courts for consideration.

Although the information in issue there was documentary, both in the High Court and Court of Appeal observations were made as to what information was covered by the term “official information.” In the High Court, Jeffries J, having noted that information held by the Police was within the definition of official information, observed:

“I turn to the words of the definition. Perhaps the most outstanding feature of the definition is that the word ‘information’ is used, which dramatically broadens the whole scope of the Act. The stuff of what is held by Departments, Ministers or organisations is not confined to the written word but embraces any knowledge, however gained or held, by the named bodies in their official capacities. The omission, undoubtedly deliberate, to define the word ‘information’ serves to emphasise the intention of the legislature to place few limits on relevant knowledge. Some statutory limits are contained in s18(f), (g) and (h) of the Official Information Act.” ([1985] 1 NZLR at p586.)

The Court of Appeal did not disagree with this view, and the judgement of McMullin J appears clearly to endorse these sentiments. He stated:

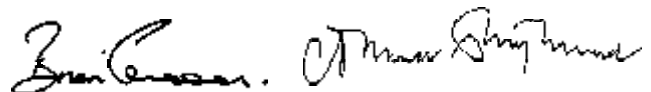
“ ‘Information’ is not defined in the Act. From this it may be inferred that the draftsman was prepared to adopt the ordinary dictionary meaning of that word. Information in its ordinary dictionary meaning is that which ‘informs, instructs, tells or makes aware.’ ”

Notwithstanding arguments to the contrary, we have not been persuaded that ‘information’ for the purposes of the official information legislation excludes knowledge in a person’s mind that has not otherwise been recorded in documentary form.

Our view implicitly reflects the underlying purposes of the legislation, namely availability of information to promote the accountability of government and to enable individuals to participate more effectively in the making and administration of laws and policies. In the ordinary course of the day-to-day work of government, there will often be no need for decision-makers to record all detailed background information about advice, recommendations or decisions that is already known to them. In many cases, it is only when such information is requested by another party that there is any practical need to reduce such information to writing. However, the fact that information has not yet been reduced to writing does not mean that it does not exist and is not “held” for the purposes of requests under the official information legislation.

In these circumstances, if the official information legislation were to apply only to information held in documentary form, the purposes of the legislation could be easily frustrated.

The Crown Law Office has closely considered our approach to this issue recently and expressed agreement with it.



Sir Brian Elwood
Chief Ombudsman

Anand Satyanand
Ombudsman

Loan repayable by user of the money

A Polytechnic student who took out a student loan but gained nothing from doing so was held liable by the IRD to repay the loan, the administration fee and the accrued interest. But ethically, the Polytechnic agreed it had a responsibility to repay the entire debt. The student had enrolled at the Polytechnic and taken out a student loan to see her through the course. She then decided to enter fulltime employment and withdrew her enrolment before the course began. In the meantime, the Polytechnic had received the money from the Student Loan Scheme, which it subsequently failed to repay. She thought no more about the loan until she received a tax return including the loan amount. She contacted the IRD. It advised her that, even though the loan monies had been paid direct to the Polytechnic, it was she who was liable to repay the debt plus interest. The IRD then threatened that if the debt were not repaid, money would be deducted automatically from her income.

The Polytechnic repaid the original loan to the IRD, but initially refused to pay the interest and penalties which had accrued. After informal discussions with the Ombudsmen, the Polytechnic agreed to repay the loan administration fee and the accrued interest and penalties. The Polytechnic found that its system to refund student loans in such circumstances had not worked in this case, and apologised to the student for the inconvenience caused. But it also wondered why the student had not contacted it earlier when she must have had notice that her student loan had been granted.



OIA Status of Audit NZ

Is information held by Audit New Zealand “official information”? We believe it is not.

Audit NZ was established in 1992 as a separate business unit in a reorganisation of the Audit Department. Previously, the Audit Department was subject to both the Ombudsmen Act and Official Information Act but neither the Auditor-General nor the Audit Office were a Department, not being named in the legislation, so neither were subject to either Act.

The question has been asked whether Audit NZ should properly be considered to be still part of the Audit Department. If it is no longer part of the Department, but part of the Audit Office, it is outside the scope of the Act.

If Audit NZ remains part of the Department, that does not of itself mean that information held by Audit NZ is “official information.” Because the Department is charged with providing staff to enable the Audit Office to carry out its functions, and if that is what the staff in question are doing, then the information those staff hold is held solely on behalf of the Audit Office.

In such circumstances, the “agency” and “safe custody” exclusions from the definition of “official information” would apply, and such information in the hands of Audit NZ would not be official information.

That is not the end of the matter. Information for audit will be “official” if the organisation supplying it is itself subject to the Official Information Act or the Local Government Official Information and Meetings Act. Approaching the supplying agency for information may be successful. Approaching Audit NZ is likely to be unsuccessful.

Out-of-date policies should be withdrawn

A complainant claimed that the Inland Revenue Department was wrongly continuing to use an out-of-date policy in the performance of its functions. The policy, set out in two departmental circulars, related to the exercise of a statutory discretion. It had originally been formulated in 1988, and had last been updated in 1993. Before the adoption of the policy the then Chief Ombudsman had been given a draft for perusal and had commented that it seemed “fine”. The complainant was concerned that notwithstanding legislative changes affecting the position since that time, the Department had apparently decided to continue to use the old policy in the two circulars. The complainant argued that this was unlawful and/or unreasonable and/or wrong.

The Department replied that the circulars were very old, the procedures contained in them out of date, and the kind of approach they embodied no longer appropriate. But although it had informed its staff of changes to the policy, and no longer produced circulars of the kind in question, it had not formally withdrawn them. The Department further advised that it proposed to produce a Standard Practice Statement for internal and external use, to avoid any future confusion in the minds of interested parties as to departmental practice. In light of this explanation, the Department was asked to withdraw formally the obsolete circulars, and to provide the Ombudsmen with the promised statement once it had been prepared. It agreed and the complainant was satisfied.

When a Relationship Has Stopped Being “Personal”

If a relationship has stopped being “personal” it should have no impact on any entitlement to a benefit.

This was the situation when an ex-husband became a guest of his ex-wife. A beneficiary complained to the Ombudsmen that she was dissatisfied with the response she had received from the Department of Social Welfare following a meeting held with departmental officials who had queried her benefit entitlement because her former husband was temporarily residing with her. She had been married to and was legally divorced from her former husband 10 years previously. The problem arose after he, who had been overseas but had returned and was living with his ex-wife, declared in his application for a Sickness Benefit that he was living temporarily with his former wife. He was advised by the Department that because of his former relationship, he would only be allowed to reside with the complainant for a month.

The complainant took exception to the restriction because a marriage-type relationship did not exist.

He was living with the complainant and her two children, of whom he was not the father. The complainant considered the Department’s perception of the relationship was narrow and moralistic.

She was not satisfied that her representations as to her relationship with her former husband had been accepted by the Department. She wanted a formal letter retracting the limitations that had been imposed on her former husband and an assurance that the Department’s investigation into her privacy had been unwarranted. The Ombudsman agreed to approach the Department. He was satisfied with its answer that it was obliged to investigate and clarify the circumstances, and that had required some invasion of her privacy. At the same time, the Department agreed that in view of the divorce having occurred some years previously, and the fact that the complainant’s former husband was not the father of her children, that he would be able to reside with her. It agreed to provide her with a letter confirming that no limitations as to domicile would be imposed on the former husband.

Legal Professional Privilege

Whether legal professional privilege is applicable as a good reason to withhold official information continues to be a cause of complaint. The maintenance of legal professional privilege is recognised as a good reason to withhold information under S9(2)(h) of the Official Information Act but, subject to S9(1), this section applies: “*if, and only if, the withholding of the information is necessary to maintain legal professional privilege.*”

“Legal professional privilege” is a public policy privilege designed to protect confidential communications between solicitor and client. It is based on the impossibility of conducting legal business without professional assistance and the necessity for full and unreserved confidence between the adviser and client in order to receive that assistance effectively (*Rosenberg v Jaine* [1983] NZLR 1).

Two concise tests on legal professional privilege have been set out by New Zealand courts:-

1. Solicitor/client privilege applies to confidential communications between legal adviser and client where the legal adviser is acting in his/her professional capacity as such, and the communications are for the purposes of obtaining legal advice.
2. Litigation privilege applies to documents that come into existence when litigation is in progress or is reasonably apprehended, and where the dominant purpose of the litigation is to enable the legal adviser to conduct litigation or give advice on it.

There was a full discussion of legal professional privilege in the editorial of Vol 2 No 2 (June 1996) of the *Ombudsmen’s Quarterly Review*. Waiver of legal professional privilege was also discussed, in Vol 2 No 3 (September, 1996).

PROTECTION OF SIGNIFICANT TREES

It can be difficult to protect significant trees when these have not been identified and included in lists of notable, heritage or significant trees, subject to the rules of a District Plan. Councils need to identify significant trees and accord them protection in advance through District Plans. Attempts to protect trees not so covered are likely to end in disappointment and the loss of an environment. A very large oak tree was only drawn to the council's developer sought to remove it, received. The surveyor had from his report on the proposed council had learned of the situation there was little it could do to stop the felling. The complainant considered the council had not done enough.



irreplaceable part of the local had managed to escape listing and attention by neighbours when a under a subdivision consent he had omitted any reference to the tree subdivision. By the time the

subdivision. By the time the council had learned of the situation there was little it could do to stop the felling. The complainant considered the council had not done enough. It was suggested that the council might have sought an Interim Enforcement Order from the Environment Court to protect the tree. The reason the council had not done this was because of an earlier decision by the Court that an IEO in such circumstances was an interference with the landowner's rights to use land in accordance with the permissive regime under the Resource Management Act. The proper course was for the council to revisit the rules in its District Plan.

Compendium of Case Notes

The Ombudsmen have published the 11th Compendium of their Case Notes, which records significant and important decisions during the period July 1992 to December 1997.

During that time, the Ombudsmen considered 19,154 complaints, of which 14,583 arose under the Ombudsmen Act 1975 and 4,571 under the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987.

The Case Notes are one means by which the Ombudsmen inform the public, the legal profession and public sector agencies subject to the Ombudsmen's jurisdiction, about the work they undertake. They reflect the range of issues which the Ombudsmen can be called up on to address, and generally illustrate the process by which the outcome of the investigation was reached. The Case Notes are designed to be specific and factual. Some of them include additional observations about the issues raised or related issues.

They are intended to be used as a resource, so may be quoted from and/or reproduced, but are also subject to the ordinary protections of the Copyright Act 1994, which extends to all forms of photocopying and any storing of material in any kind of information retrieval system of the entire 11th Compendium. The Compendium has been published in association with Butterworths.