

**Editorial**

**A Reasonable Approach to What is ‘Official’ Information**

Many requests under the Official Information legislation are aimed at identifying what information may be held about a particular decision making process rather than targeting a specific known document. Such requests can cause departments and organisations initial difficulties in determining what information it should consider in processing its response.

Where the process to which a request relates has been completed so that no more information is being generated, there is usually little problem in identifying what information is held for the purposes of responding to the request. However, where the process is still ongoing, new information that comes within the terms of the request may well be generated after the request is received but before any decision on the request has been made.

On several occasions recently departments and organisation have been unsure whether, for the purposes of responding to a request for official information, they are required to consider only information held at the time the request is received or whether they need to consider new information generated after that date but before they finalise their response

The general approach of the Ombudsmen has been to suggest that departments and organisations take a flexible approach with a view to reaching a sensible balance between a literal application of the legislation and administrative practicality. In general terms, it is reasonable to consider a request on the basis that it applies only to information held at the time of the request so long as that is clearly communicated to the requester.

However, there have been cases where the specific information requested did not exist at the date the request was received, but came into existence shortly thereafter. To refuse the request in these circumstances solely on the basis that the information was not held at the date the request was received may be unreasonable. Common sense would suggest that it would be reasonable to advise the requester that the information requested had come to be held after the request was received and to process the request in the normal way.

On the other hand, in circumstances where new information is being generated on virtually a daily basis, administrative practicality would reasonably require the setting of a cut off date so that the information deemed to be covered by the request can be properly considered. So long as the requester is advised of the cut-off date and that further information has been or continues to be generated then the requester is not disadvantaged unreasonably. The requester is free to make a separate fresh request for any information generated after the specified cut-off date.

Our practical experience has shown where departments and organisations take a flexible common sense approach consistent with the spirit and purposes of the Official Information legislation then administrative concerns can be managed without undue difficulty.

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Chief Ombudsman

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## FIRST DECISIONS NOT MADE BY OMBUDSMEN

Government agencies themselves must decide how to respond to requests for official information under the Official Information Act in the first instance. An Ombudsman has no role to direct a department or organisation as to how it should respond to a request.

Only when the requester or some other affected party is unhappy with the response can a complaint be made to an Ombudsman.

The department or organisation, however, may check whether any third party interest would be likely to be prejudiced by granting the request before deciding on its response. It needs to do this to avoid a complaint being made that it has not acted in good faith.

If the third party does not wish the information to be disclosed to the requester, the department or organisation must have regard to the concerns expressed, but the third party's wishes do not themselves provide good reason for refusing a request.

If the department or organisation believes in good faith that the concerns do not provide good reason for withholding the information, and there are no grounds on which the request could otherwise be properly refused, then it must make the information available.

## Minister's answers to MPs' questions

The Ombudsmen have no jurisdiction under the Official Information Act (OIA) to review any Minister's answer to questions from MP's raised during or in relation to Parliamentary proceedings.

Article 9 of the Bill of Rights Act, 1688, is one of the foundations of New Zealand law. It says: *"That the freedom of speech in debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament"*.

These words go to the heart of Parliamentary privilege. The Imperial Laws Application Act 1988 of the New Zealand Parliament brings the 1688 English Act into New Zealand law.

There was a recent complaint on this issue. An MP had asked a series of related written questions and the Minister's replies had withheld some of the information sought, purporting to cite the OIA as grounds for withholding. The reply also advised the MP of the right to ask an Ombudsman to investigate and review the Minister's refusal to provide the information.

In fact, the Ombudsmen have no power in this matter. Parliamentary answers or refusal to answer are protected by the Bill of Rights Act.

However, an MP may ask a Minister the same questions separately from Parliament's proceedings, in which case the OIA would indeed apply to the information sought.

A similar complaint and outcome were reported in an earlier "OQR" – Vol 1, No 2.

## OIA AND UNSOLICITED INFORMATION

Recipients of unsolicited information have no redress under the Official Information Act (OIA) if the information is incomplete.

A recipient of an unsolicited public release of Cabinet papers by a Minister complained to the Ombudsman about a number of deletions from the papers.

An Ombudsman's jurisdiction under s28(1)(a) of the OIA to investigate and review a complaint relies on the complainant first having made a request for the information in accordance with s12 of the Act, which had not happened in this case.

Unsolicited releases of information need not be discouraged but the holders of the information, its authors, and the suppliers to the holder, will not have the legal protections arising from the release in good faith that are otherwise afforded by s48 of the OIA.

## CONSOLIDATED INDEX

*This is a Consolidated Index of articles appearing in the most recent 17 issues of the Ombudsmen "Quarterly Review" – running from March, 1997, to March, 2001. The first number is the folio (year) - 3 being 1997, 4 being 1998, 5 being 1999, 6 being 2000 and 7 being 2001 - and the second number is the issue (quarter). For reasons of space, all references to the first two years (1995 and 1996) have been deleted from the Index*

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## Definition of “essential”

The distinction between what is “desirable” and what is “essential” may affect a decision on whether a project meets established eligibility criteria and so as to make it qualify for public funding.

An application to the organisation Enable New Zealand (ENZ) for a housing modification grant had been made by a GP on behalf of a patient whose two-storey house was the home of a woman with increasing mobility problems. (ENZ is the subsidiary of the Ministry of Health which funds such matters.) She was only able to move from one floor to another by going outside and using a sloping, metalled driveway by wheelchair. Funding was sought for an internal chair lift to be installed.

This was refused by ENZ from whom the funds would have come, and the refusal endorsed by the Health Funding Authority (HFA).

ENZ criteria require that *“modifications are essential to enable the person to have mobility into and within the home; and return to or remain in the home.”* Upon investigation, the Ombudsman considered that the term *“essential”* means that there is no other viable alternative.

The Ministry of Health agreed that in this case there was no other viable alternative, and so approved the funding needed.

## *A “Workshop” not a “Meeting”*

For a decision to comply with the terms of the Local Government Official Information and Meetings Act 1987 (LGOIMA), it has to be made at a properly constituted meeting. An informal meeting or “workshop” may not be used for this purpose.

This situation arose recently when a territorial local authority contracted out the preparation of its District Plan following a decision at what it called a “workshop.”

This decision was the subject of a complaint but no record had been kept of the decision. There was concern about the procedures the council had followed. It did not understand what constituted a “meeting” under Part VII of LGOIMA.

LGOIMA does not permit decisions to be made outside the context of a properly constituted meeting. If they are made outside that context, then the public notification and public conduct requirements of LGOIMA are being avoided.

Calling something a “workshop” when it is in fact a “meeting” does not fulfil the requirements of s45(1) - which defines what a properly constituted meeting is - and so is contrary to law.

## ACCESS NOT A COURTESY, BUT A RIGHT

It seems that some Government agencies may be allowing access to official information only as a courtesy when access should be as of right.

A barrister approached the Ombudsmen with a complaint that the Police had allowed him access to only some material on file about his client. On his complaint about this, he was later shown all the material but was told he was seeing it only “as a matter of courtesy.”

The Ombudsmen have long taken the view that the Official Information Act (OIA) confers a right to request official information. Such requests must be considered in accordance with the provisions of the OIA and not as a matter of grace and favour.

Declining a request for information is permissible only where the OIA or, where applicable, the Privacy Act, identifies good reasons to withhold information and the facts support those good reasons.

## *Questions and the OIA*

To require a response in terms of the Official Information legislation, the Official Information Act (OIA) and the Local Government Official Information and Meetings Act (LGOIMA), questions must be put so as to elicit information that already exists. Questions designed to draw an opinion are not covered by either Act. Questions and the OIA

The Governor of the Reserve Bank recently refused to answer a series of questions from a reporter on the grounds that they were seeking an opinion, and the reporter approached the Ombudsmen.

It was necessary to distinguish between questions that can be answered from information already held by the organisation, and questions that require the organisation to form or express an opinion.

The Official Information legislation was not intended to be mechanism to question those subject to it about a topic in which the requester had an interest.

In this case, only one question was for factual information held by the Reserve Bank, which agreed to reconsider this small part of the reporter’s request.