

Editorial:

**Explaining the purpose of your official information request can be helpful**

Telling an agency the reasons why you are making an official information request may mean you receive a more timely and comprehensive response to your request.

Under the Official Information Act (OIA) and Local Government Official Information and Meetings Act (LGOIMA), individuals can request official information held by Ministers of the Crown and central and local government agencies.

There is no requirement in the OIA or LGOIMA for requesters to explain the reasons for, or purpose of, their request.

However, in many cases, it may be helpful if a requester is able to explain the reasons why they are seeking the information when making their request.

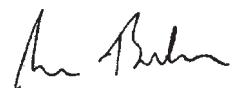
Explaining the purpose of a request may:

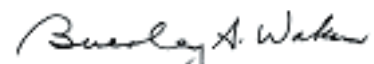
- assist agencies to identify and consider more quickly the actual information the requester is seeking;
- assist agencies to identify other access options under the official information legislation should there be a good reason for withholding some or all of the information in the way it has been requested. For example, an agency may decide that there is good reason to refuse to provide a requester with a copy of the information but may be willing to let the requester inspect or view the information or to provide the information subject to certain conditions;
- assist the agency to identify any considerations favouring the disclosure of the information in the public interest and to assess whether these considerations outweigh any reasons for withholding the information; and
- prevent time being lost through consideration of administrative issues (such as transfer, collation and research, charging or consultation of third parties) which may not have been necessary if the reasons for the request had been clarified at the outset.


A recent complaint to the Ombudsmen, discussed on page 2, provides a practical example of how explaining the reasons for a request at the outset can help avoid misunderstandings or confusion as to how the request should be interpreted.

In making and considering official information requests, requesters and agencies alike should bear in mind that:

- there is no requirement in the OIA and LGOIMA for a requester to specify the reasons for their request and failure to provide reasons for a request does not provide grounds to refuse that request; but
- if requesters are able to explain why they are seeking particular information, this may assist the holder of the information to respond to the request in a more timely and effective fashion;
- similarly, in certain cases, if a requester hasn't identified the reasons for a request, an agency should consider whether to ask the requester for reasons (bearing in mind that there is no obligation on the requester to give reasons);
- direct discussion between the requester and the agency to clarify, where possible, the reasons for a request may assist in a more timely and effective consideration of the request; and
- the extra effort involved in providing or seeking explanatory comments at the outset of a request are more than likely to be off-set by the potential savings in the time taken to process a request which has been clearly clarified.

  
John Belgrave  
Chief Ombudsman

  
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Mel Smith  
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## Explaining the reasons for your request may assist the holder to respond

As mentioned in our editorial, a recent complaint to the Ombudsmen has illustrated how explaining the purpose of an official information request at the outset may assist the holder of the information to respond to that request in a more timely and effective way.

An official information request was made to the Department of Corrections for all documents generated by the Department on potential changes to the parole system.

The requester also made identical requests to the Ministry of Justice and the Commissioner of Police.

Because requests had been made to a number of agencies, Department of Corrections' staff thought that the requester was interested in papers relating to the policy process itself. The Ministry of Justice was leading the policy process. In these circumstances, it was felt that the information at issue was more closely connected with the functions of the Ministry of Justice and the request was therefore transferred.

The requester complained about the transfer. The requester explained that, in making his requests, he was trying to ascertain the views of the different agencies with regard to the proposed changes to parole. He said that he believed that the Department of Corrections was in the best position to provide him with its views and the documents it had generated.

The requester's comments were discussed with the Department of Corrections. The Department explained that, had the requester provided this wider explanation in his original request, the information would have been properly identified and considered without any time being lost through an, ultimately, unnecessary transfer.

The complaint was resolved on the basis that the requester would make a fresh request explaining his reasons for the request. For its part, the Department agreed to consider the fresh request promptly.

## Grounds for withholding commercial information

The OIA recognises that, in certain circumstances, there is a need to protect information which might be described as "*commercially sensitive*".

For example, a government agency may be engaged in commercial activities or engaged with others in the commercial sector in circumstances where it is necessary to withhold information in order to protect that agency's financial interest in getting the best return on its investment.

Section 9(2) of the OIA sets out a number of withholding grounds which may be relevant in such cases.

One such withholding ground is section 9(2)(i) which applies "*if, and only if, the withholding of information is necessary to [e]nable a Minister of the Crown or Department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities...*"

Generally speaking, section 9(2)(i) recognises that it is in the public interest for those subject to the Act to be able to carry out commercial activities without prejudice or disadvantage.

The Ombudsmen are of the view that, in the context of this section, for the activities in question to be "*commercial*", they must be undertaken for the purposes of making a profit.

This interpretation is consistent with both dictionary definitions of the word "*commercial*" (which refer to the conduct of commerce and trade for the purposes of profit and loss) and with case law in both New Zealand and overseas.

While there are many cases dealing with the issue of whether a particular activity is "*commercial*" or not, two examples will suffice.

In Canada it has been said: "*... whatever other attributes an activity may have it is not a commercial activity unless it has as its predominant purpose the making of a profit.*" (Calgary (City) v Alberta (Assessment Appeal Board) (1987) 77 AR 23 (QB))

Similarly, in New Zealand, the High Court has stated:

"*The meaning of the word 'commercial' in the context of the Gaming Act is not difficult to discern: it has its ordinary meaning. A commercial operation is simply one which is conducted for no other purpose than financial gain or profit.*" (New Zealand Racing Industry Board v Attorney-General [2003] NZAR 85)

This "ordinary meaning" is seen to apply equally in the Official Information Act context.

If section 9(2)(i) does not apply to the information requested that is not, necessarily, the end of the matter. It may well be that another withholding ground is relevant.

For example:

- if the information at issue is subject to an obligation of confidence and disclosure of the information would be likely to prejudice the public interest, section 9(2)(ba)(ii) of the OIA may apply; or
- if disclosure of the information would prejudice or disadvantage the ability of an agency to carry out negotiations, section 9(2)(j) of the OIA may apply.

In deciding which, if any, of the withholding grounds may be appropriate in the circumstances, an agency should consider:

- the nature of the information at issue;
- how the information was created or came to be held; and
- the specific nature of the harm that would be likely to result if the information was disclosed.

# **Own Motion investigation of the Department of Corrections in relation to the Transport of Prisoners**

On 12 June 2007, Chief Ombudsman John Belgrave and Ombudsman Mel Smith tabled in Parliament the report of their own-motion investigation into the transport of prisoners.

The Ombudsmen's investigation followed the death of Liam Ashley on 25 August 2006. Liam Ashley, a 17-year-old prisoner, died as a result of an assault committed by an adult prisoner being carried in the same compartment of a prison van.

There was considerable public concern about the circumstances of Liam Ashley's death. That, combined with a number of other complaints about prisoner transport conditions, prompted the Ombudsmen to undertake an investigation of their own motion into prisoner transport by, or on behalf of, the Department of Corrections.

The Ombudsmen approached the matter on the basis that prisoner transport should be safe, secure and humane. However, they discovered numerous aspects of prisoner transport by road that concerned them.

Mr Belgrave and Mr Smith concluded that the designs of many prisoner transport vehicles are unsatisfactory from the viewpoint of road safety. Prisoners are not provided with seat belts or other forms of safety restraint, and there is no adequate provision or process by which prisoners may swiftly be evacuated in the event of fire or road accident.

There is lack of adequate opportunity for staff surveillance of and communication with prisoners, rendering it impossible for staff to deal with any problems that may develop in prisoner compartments.

Many vehicles have no adequate ventilation or temperature control in prisoner compartments. Prisoners may not be provided with adequate water, toilet or rest breaks during journeys of considerable length. These conditions must be considered in the light of the cramped and crowded nature of the compartments.

Smoking, which would allow prisoners to set light to themselves or others in prisoner compartments, is officially prohibited. However, the investigation determined that this rule is frequently broken.

Prisoners may be handcuffed to one another for long journeys. This may be necessary in certain cases, but general practice on handcuffing varies throughout the country.

Overall, the lack of standard national procedures in a variety of areas led the Ombudsmen to conclude that the head office of the Public Prisons Service division of the Department is out of touch with what actually happens at the front line.

Documentary procedures intended to achieve safe and secure transport of prisoners appear satisfactory. If error occurs, it is likely to be through individual human mistake or unpredictability on the part of prisoners. However, the Ombudsmen consider record keeping is deficient in that insufficient detail is kept of prisoner transport conditions, such as supply of food, water and rest breaks.

The report contains 24 recommendations to Parliament. One of those recommendations, relating to emergencies, has 11 separate parts.

The Ombudsmen also looked at transport of prisoners by air and found that this mode of transport seems to operate satisfactorily.

The Department has already embarked on a wide-ranging review of prisoner transport issues, and many of the concerns raised in the report are already under consideration. A list of the Department's work is attached as an annex to the Report.

## **NEW LOOK WEBSITE - [www.ombudsmen.parliament.nz](http://www.ombudsmen.parliament.nz) -**

The Office of the Ombudsmen has launched a new and improved website.

Features of the new website include:

- a more detailed explanation of the functions and powers of the Ombudsmen under the Ombudsmen Act, official information legislation and the Protected Disclosures Act;
- information about how to complain to the Ombudsmen and how a complaint will be processed;
- a guide for requesters on how to make official information requests, the Office of the Ombudsmen Practice Guidelines on the Official Information Act and a check-list for holders of information;
- on-line complaint forms;
- an on-line publication subscription form;
- electronic copies of all the Office of the Ombudsmen pamphlets;
- information about the Ombudsmen's regional clinic schedule, speaking engagements and international contacts;
- copies of the legislation that set out the Ombudsmen's powers and functions; and
- a publication search function: many Office of the Ombudsmen publications (such as Annual Reports, case notes, reports to Parliament, speeches and presentations) can now be down-loaded from our website. You can locate and view these documents using the "search publications" function on our home-page.

The website can be accessed at: [www.ombudsmen.parliament.nz](http://www.ombudsmen.parliament.nz).

The domain name for our website has changed from "govt" to "parliament". The Office's email addresses have also likewise changed. This change is to better reflect the Ombudsmen's position as Officers of Parliament who are independent of the Government of the day.

We would welcome your feedback on our website. If you would like to provide feedback on the website, or the information contained in it, please telephone us on 0800 802 602 or email: [webmaster@ombudsmen.parliament.nz](mailto:webmaster@ombudsmen.parliament.nz).

### **14<sup>th</sup> Compendium of Case Notes**

The 14<sup>th</sup> Compendium of Case Notes is now available.

The Compendium includes case notes of investigations under the Ombudsmen Act and reviews under the OIA and LGOIMA. It covers the period January 2002 to December 2004 during which time the Ombudsmen considered 9,478 cases comprising some 13,974 complaints.

The case notes enable the Ombudsmen to keep both the general public and public sector agencies informed about the nature of the issues brought before them for consideration. They also illustrate the investigation process and the grounds upon which the findings were based. They are therefore designed to be educative and informative.

Electronic copies of all of the case notes contained in the 14<sup>th</sup> Compendium (and earlier Compendiums back to and including the 10<sup>th</sup> Compendium) can be viewed on our website ([www.ombudsmen.parliament.nz](http://www.ombudsmen.parliament.nz)) using the "search publications" function. If you are unsure how to search for case notes of interest, the advice under the tag "help" on the search page of the website may assist.

Hard copy versions of the Compendium are also available for purchase at a cost of \$12 each (inclusive of postage and packaging).

A 15<sup>th</sup> Compendium of Case Notes is expected to be available by the end of this year or shortly thereafter.