

Notes for briefing of the new government

The Ombudsman: Our constitutional role

Newly appointed Ministers of the Crown and Parliamentary Under-Secretaries will discover that they have a raft of new statutory responsibilities. One of these is handling official information requests under the Official Information Act 1982 (OIA).

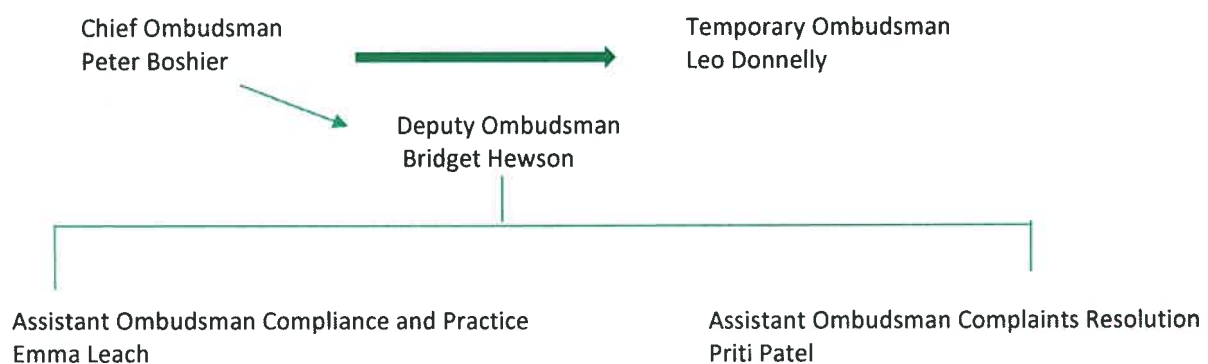
This Guide aims to introduce you to and assist you with understanding the OIA, and the roles and functions of the Ombudsmen which may impact on you as a Minister or Parliamentary Under-Secretary.

Peter Boshier
Chief Ombudsman

1 November 2017

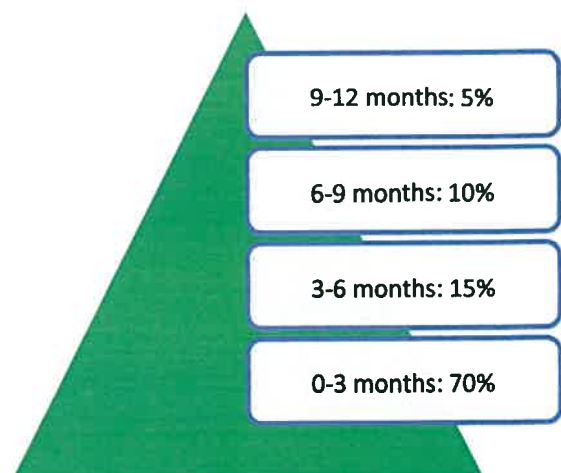
The Office of the Ombudsman at a glance

- At present, the Office has around 80 employees (plus a Chief Ombudsman and temporary Ombudsman), and 20 contractors, spread over three locations – Wellington (81% of staff), Auckland (12% of staff), and Christchurch (7% of staff).
- The Office is relatively small compared to the Ministries and Departments we are tasked with investigating. In 2016/2017, our budget was agreed to by the Officers of Parliament Select Committee (OPC) as \$14.2m.



My Office's strategic direction aims:

- Greater focus on capability building and addressing systemic issues through:
 - Systemic investigations
 - OI practice investigations (audits of agencies' OIA processes)
 - Publication of OIA guidance
 - Ongoing work with SCC to publish statistics on OIA requests and complaints
 - Provision of training and guidance to agencies and Ministerial Offices
- Complaints dealt with faster and better – by 2019/2020 the intention is for all to be done within 12 months



What an Ombudsman does

Ombudsmen are Officers of Parliament, whose responsibilities include:

- investigating alleged maladministration under the **Ombudsmen Act 1975**, and forming opinions on whether the administrative acts, decisions, and omissions of public sector agencies were unlawful, unreasonable, or wrong;
- investigating complaints and reviewing decisions of central government agencies on information requests under the **Official Information Act 1982 (OIA)**;
- investigating complaints and reviewing decisions of local authorities on information requests under the **Local Government Official Information and Meetings Act 1987 (LGOIMA)**;
- being a National Preventive Mechanism under the **Crimes of Torture Act 1989 (OPCAT)**, with the sole or shared responsibility for monitoring and making recommendations for improving the conditions in:
 - 18 prisons;
 - 80 health and disability places of detention;
 - 3 immigration detention centres;
 - 4 child care and protection residences, and
 - 5 youth justice residences;
- being an Independent Monitoring Mechanism under the **Disabilities Convention**;
- receiving disclosures as an *'appropriate authority'* and providing advice to whistle-blowers under the **Protected Disclosures Act 2000**; and
- **providing advice, guidance, and training** on matters within the Office's purview to Ministers' Offices, public sector agencies, interest groups, political research units, and others, on request.

A snapshot of our work in the 2016/2017 year

Ombudsmen Act

- We completed a total of **8,864 Ombudsmen Act** matters:
 - 84% from individual members of the public, and 12% from prisoners.
 - the agencies that generated the most complaints were the Department of Corrections, the Ministry of Business, Innovation and Employment (and, in particular, Immigration New Zealand), the Ministry of Social Development, and the Inland Revenue Department.

Official information legislation

- We completed **1,633 OIA and LGOIMA matters**, of which:
 - 20% from media, and 8% from MPs or political party research units.
 - 10% against Ministers, 37% each against departments, and 37% against state sector agencies.

OPCAT monitoring and inspection

- Conducted **57 full inspections and visits to places of detention** (63% were unannounced).
- Made **185 recommendations for improvement**, 149 of which were accepted or partially accepted.

Protected Disclosures Act

- We responded to **34 enquiries and 10 requests for advice or guidance under the Protected Disclosures Act**
- Continued our involvement as a partner in Griffith University review of Australasian whistleblowing procedures.

Advice and guidance to agencies

- Provided **informal advice to agencies and Ministers on 184 occasions**, conducted 30 workshops and training seminars, and published 26 new guidance materials.

Ombudsmen Act 1975

- An Ombudsman may investigate the administrative acts and decisions of agencies upon complaint or of his or her own motion.
- **Ministers of the Crown themselves are not subject to the Ombudsmen Act.** However, the adequacy and accuracy of departmental advice relied on by a Minister to make a decision may be investigated under the Act.
- Ministers typically are involved only in cases where an Ombudsman forms an opinion and makes a recommendation against one of the agencies for which you are responsible. A copy of the report would be provided to you.

Systemic improvement

- My Office also has a team dedicated to identifying, monitoring and resolving significant and systemic issues. It may also investigate where appropriate. One of the first projects we have undertaken is to review the way in which we monitor serious incidents in prison (including all deaths in custody).

Official information practice improvement

- My Office has a team that reviews official information practices across the public sector. By the end of 2017, we will conclude our reports to the 12 individual agencies initially identified for investigation of their official information practices.
- We are also making good progress in developing good practice indicators and a maturity model to inform similar investigations in future.

Publication of OIA complaints data

This Office will publish information about all OIA complaints, including:

- The nature of the complaint
- The type of complaint
- The outcome of the complaint
- Whether any deficient conduct was identified following a full investigation
- The nature of any deficient conduct identified
- The remedies achieved as a result of the Ombudsman's intervention

Official Information legislation

The Official Information Act 1982

- The OIA is a key accountability mechanism, and is recognised by the courts as a constitutional measure.
- The OIA's starting point is the **principle of availability**, which states that information should be made available unless there is good reason for withholding it.
- The OIA strikes a balance between competing interests. This is reflected in its stated purposes, which are to:
 - › **make more official information** available in order to:
 - » enable effective public participation in law making and government;
 - » promote the accountability of Ministers and officials; and
 - › **enhance respect for the law and promote good government** of New Zealand;
 - › **protect OI** consistent with the public interest and privacy.

Grounds for withholding of information

The OIA clearly recognises situations in which the public interest is best served by protecting information. Ministers who have portfolios dealing with international relations, security, and maintenance of the law will be particularly concerned with section 6, which provides conclusive grounds for withholding in certain situations. There are also a number of situations where there may be a presumptive reason for withholding information under section 9, but where a decision-maker, or Ombudsman on review, must consider whether the reasons for withholding are outweighed by public interest considerations favouring disclosure.

I am particularly keen right now to set a more reliable platform for when information such as Chief Executive briefings of Ministers, and the floating of 'blue skies' concepts, might be protected with more certainty than has previously been the case. I hope to foster a culture where officials may provide Ministers, and Ministers provide Cabinet, with free, frank and fearless opinion material on sensitive issues, in the knowledge that only in rare occasions would a countervailing public interest be strong enough to override this protection.

Ministers and the OIA – why it matters

- Ministers set the tone for **open, transparent, and accountable** government:
 - Ministerial compliance with the OIA **improves agency culture**, which in turn promotes public trust and confidence in executive government.
 - Conversely, **Ministerial non-compliance** with the OIA **damages public trust and confidence**. I note the widespread public, media and political criticism of a former PM's statement that his Office routinely delayed OIA responses. Allegations of deliberate non-compliance through gaming of requests are particularly damaging to public trust and confidence.
 - Even **the appearance of non-compliance can damage public trust and confidence**. While I ultimately found no improper Ministerial interference in KiwiRail's decision on an OIA request for certain information, questionable decision-making by the agency and unclear lines of responsibility for how and when to consult the Minister on OIA requests meant KiwiRail and the Minister each attracted public, media and political criticism. The Minister also attracted accusations of deliberate gaming.

Open complaints against previous Ministers

Some of you will hear from me soon about complaints my Office currently has on hand, concerning the decisions of previous Ministers of certain portfolios. I intend to provide you with a choice of reviewing the decision made by your predecessor in each case and deciding whether you are willing to:

- adopt that decision (in which case, my investigation will continue); and
- make a different decision (in which case, I would most likely discontinue my investigation)

In either event, my Office will guide you through what you need to do, bearing in mind that your response may be subject to statutory timeframes and certain requirements to supply information when I ask for it.

Your obligations as a Minister under the OIA

- Any official information held may be requested and, unless there is good reason to withhold it, must be released as per the principle of availability.
- Official information is **information held in your Ministerial capacity**, and may include in your heads, personal devices, email accounts, and diaries.
- Official information does not include information held solely in your other capacities, such as information held only as a Member of Parliament or as a member of your respective political parties.
- Your **key obligations under the OIA** are to:
 - **assist the requester** to make a request to which you can respond
 - **identify, retrieve, and review** the requested information
 - **make a decision**, within the time limits specified by the Act, by assessing each piece of information against the OIA withholding criteria. The time limits are:
 - **release information** without undue delay and, if you have decided to withhold some of the requested information, **tell the requester why and inform them of their right to complain to the Ombudsman**

Key timeframes

Your legal timeframe requirements for responding to requests for official information are to make a decision and communicate it to the requester *'as soon as reasonably practicable'* and no later than 20 working days after the request is received.

However, if you intend to transfer the matter, you must do so within 10 working days after the request is received.

You may extend the timeframe for making a decision on the request, including a decision to transfer, but must do so no later than 20 working days after the request is received.

Should you decide to release information, you should do so *'without undue delay'*.

Requests to the agencies for which you are responsible

- **Ministers may properly have an interest in requests handled by the agencies for which they are responsible**, if release may impact on your functions, or you need to prepare for possible public or political commentary.
- You must be clear, however, that:
 - **Agencies are responsible for responding to requests they receive** unless it is formally transferred to you as a Minister under the OIA;
 - Agencies and Ministers should agree that Ministers occasionally need to make, be involved in, or otherwise know about decisions on OIA requests concerning matters involving the Minister, for a number of reasons. This may trigger the need for:
 - › **Consultation**, which allows a decision-maker to elicit from third-parties, which may include the Minister, the kind of information necessary for them to make a decision on an OIA request, including a decision on whether to transfer the request;
 - › **Transfer** of the request to the Minister, on the basis that the request is for information which is only held by, or is more closely connected to, the functions of the Minister; and
 - › **Notification of the agency's decision to the Minister** as a FYI under the 'no surprises' doctrine, advising that the agency has just released, or is about to release, certain information to a requester under the OIA.

Note: notification under FYI is not consultation, as the decision has already been made. This is simply a courtesy heads-up in light of anticipated external scrutiny or interest.
 - Failure to clarify the purpose of engagements between agency and Minister and failure to be clear on lines of responsibility can lead to accusations of gaming (e.g. KiwiRail).
- My Office has recently developed a **Model Protocol on dealing with OIA requests involving Ministers**, to assist Ministers and agencies with clarifying their lines of responsibility and, ultimately, to help avoid allegations of impropriety in OIA processing.

Complaints-handling by my Office

Should my Office has receive a complaint made against you under the OIA:

- If the matter appears to be amenable to early resolution, having regard to general principles and the institutional knowledge of the Ombudsmen, my Office will contact your staff to discuss this opportunity and, if possible, to chart a way forward;
- If early resolution does not appear possible, a formal investigation may be undertaken through:
 - **Notification** of the complaint to you, advising you of the Ombudsman's intention to investigate the matter and, usually, the basis of the complaint. The investigations are conducted in secret;
 - **Gathering information**, usually by way of asking your Office to provide me with a copy of the information at issue and a report on the basis on which you have sought to withhold it. I also note:
 - › There are statutory response timeframes attached to this step;
 - › You have to provide the information. The Ombudsmen have powers to enter premises or put parties under oath if necessary;
 - › If you or your staff consider that the matter is best discussed in another way, my Office would be open to discussing alternatives.
 - If the Ombudsman is in a position to do so, a **provisional opinion** may be formed, and comments sought from any adversely affected parties.
 - If the Ombudsman is in a position to do so, a **final opinion** may be formed and, if necessary, **recommendations made**.
- Should an Ombudsman **recommend information be released**:
 - The Ombudsman does not release the information. Instead the agency or Minister has an obligation to release the information;
 - A public duty to follow the recommendations arises on the 21st working day after the day on which the recommendation is made unless, before that day, the Governor-General, by Order in Council, otherwise directs.
 - The public duty, once it has arisen, is exercisable by the requester in a court of law.

Resources to assist you

Guidance material published by this Office

- A tool to automatically calculate response times is available on the home page of our website: www.ombudsman.parliament.nz.
- This Office has published a suite of guidance on, among other things, the proper application of OIA withholding grounds, assessing the public interest, and various aspects of processing OIA requests.
- In addition, I have today provided you with copies of:
 - the *Model Protocol on dealing with OIA requests involving Ministers*, which is intended as a helpful starting point for your discussions with the agencies for which you are responsible, so that you may agree on clear criteria for transparent, lawful, and reasonable management of OIA requests.
- I have also made available to you:
 - The *Model Protocol's* companion guide for agencies, *Dealing with OIA requests involving Ministers*, which helps sets out the reciprocal expectations between Minister and agency, from the agency's perspective. You may wish to familiarise yourself with the material and then make it available in the course of your interactions with your Chief Executives. For those of you who are responsible for more than one agency, further copies are available on my Office's website.
 - Our comprehensive guide entitled *The OIA for Ministers and agencies*, which will hopefully help fill in the blanks in terms of how generally to deal with OIA requests and make a decision in accordance with the law.
- Finally, I observe that my Office's Strategic Advice Team may, on request, provide you and your staff with guidance or training on matters relating to the OIA. Any requests for advice or guidance may be directed through our email portal: info@ombudsman.parliament.nz.