15 February 2010

Law Commission

Review of Official Information Legislation

Thank you for your letter of 7 December 2009 inviting submissions as part of the Law Commission's review of official information legislation.

As Health and Disability Commissioner (HDC), I have two core functions – the resolution of complaints under the Code of Health and Disability Services Consumers' Rights (the Code) and education about consumers' rights contained in the Code. In performing those functions, my Office routinely gathers information from a variety of sources that is subject to official information legislation.

HDC receives a large number of requests for information. Processing these requests is a time-consuming and often complex task. I have identified some of the issues that my Office encounters when processing official information requests.

General comments

Accessibility

My Office occasionally encounters difficulty due to a general lack of knowledge about the Official Information Act 1982 (OIA). Although the general ability to request information seems to be well known to the public, the finer details do not. I have observed a general lack of awareness that a request for official information does not of itself entitle the requester to the information, but rather falls to be considered under a statutory framework. In particular, there does not appear to be good understanding of the process to be followed when considering a request and the grounds for withholding information.

I consider that it would be beneficial to the public and organisations subject to the OIA for there to be readily accessible information about the process of making and handling a request. If published on-line, it is important that this information is in formats compatible with the use of software by those with hearing or visual impairments.

Delay, Collation and Charges

Processing an official information request can be time consuming and it is difficult to plan for in terms of resource allocation, as requests tend to arrive without notice. In some instances this has resulted in staff working outside of their usual hours in order to meet statutory timeframes. A recent example was a request for details in relation to stress leave taken by HDC staff over a five year period. As information in relation to leave is recorded in a number of different ways, this was a difficult and time consuming request to answer, resulting in a staff member working during the weekend. I am also aware of strategic timing of requests by some requesters in order to create delays to HDC's processes. I will discuss this issue in further detail below.

My preference is not to charge for responses to requests. In addition, HDC only very rarely uses the provisions in relation to seeking extensions and denying requests that require substantial collation. However, if requests continue to present the organisational costs I have discussed above, then this approach may have to change.

Transfer of requests

My Office frequently obtains information from other public organisations subject to the OIA while assessing a complaint, for example, ACC, the Ministry of Health and district health boards. HDC may also obtain information from organisations that are not subject to the OIA, such as the Medical Council of New Zealand. I consider that it is strongly in the public interest for there to be a relatively free flow of information between HDC and these organisations.

Sometimes information provided to HDC will have been obtained by the organisation in the course of their own investigative or other statutory functions and will be sensitive in nature. When a request includes information held by HDC that was provided by another organisation, the criteria to determine whether the request should be transferred in part are somewhat unhelpful. Often in this situation the information is being used in connection with the functions of two organisations and it is difficult to determine with which organisation it is more closely connected.

Issues may also arise when other organisations have different interpretations of the Act, or different processes for handling OIA requests. A recent example occurred due to a difference in opinion between HDC and a government department as to what equated to an OIA request, as opposed to a general enquiry. I considered the request fell under the OIA, but as it related to information relating to the investigation of another organisation, it was transferred. The organisation did not consider that the request was one for official information, namely as it did not specifically cite the OIA.

In another instance, when seeking comments prior to releasing information HDC had obtained from the ethics committee of an organisation, it was insisted by the other organisation that consent be gained from the author of a report, who was a privately engaged researcher. When the researcher refused consent, the organisation submitted that the report should be withheld. I do not consider that this approach is consistent with the OIA and resolving the matter took a considerable amount of time.

A more practical difficulty associated with the transfer of requests is the relatively short timeframe for doing so. If a decision to transfer the request is not made within ten working days then there is no capacity to transfer the request, even if that is the most appropriate course of action and in the requester's interest.

I consider that greater guidance is needed in relation to the circumstances in which a request should be transferred and that there be an ability to transfer requests beyond the statutory timeframe, with the requester's consent.

Investigations and official information law

In general, I consider that disclosure of the information gathered during the course of the investigation prejudices my ability to fulfil my statutory duties as follows: first, can potentially prejudice HDC investigations; and secondly, it can slow the investigations. I explain my reasons for this view below.

Under section 6 of the Health and Disability Commissioner Act 1994, I have a statutory obligation to secure the "fair, simple, speedy, and efficient resolution of complaints". When notifying an investigation, HDC sets out the terms of the investigation and routinely attaches the complaint, in accordance with section 41(1)(b) of the HDC Act. Information is then gathered, and a provisional opinion formed on whether the actions of a provider amount to a breach of the Code. At this stage, the information relied on to form this provisional opinion is provided for comment before the opinion is finalised.

In general, the information gathered in the course of an investigation is not disclosed to the parties to the investigation prior to releasing a provisional decision, on the basis that releasing the information would be likely to prejudice the maintenance of the law. Section 6(c) of the OIA is thus relied on to withhold much of the investigative material during the course of an investigation.

Potential prejudice to HDC investigations

As HDC investigations are inquisitorial in nature, it is vitally important that we have the opportunity to obtain untainted factual responses from the parties involved. Responses by the provider to certain questions posed assist me to decide what the next step should be in the investigation process, and ultimately provide the evidence for my opinion on whether a breach of the Code has occurred.

Disclosure of information obtained as part of an investigation at an early stage may result in a provider tailoring their response accordingly, rather than being free and frank. During the early stages of an investigation, it is often difficult to assess the degree of risk of this prejudice actually ensuing. However, I note *Commissioner of Police v Ombudsman*,[1] in which the Court of Appeal held that the word "likely" in section 6(c) means no more than a "distinct or significant possibility" as opposed to more likely than not. Releasing responses from other providers under investigation, or the expert advice on the standard of care, raises a distinct possibility that the evidence subsequently obtained from that provider will be tainted.

Natural justice and fair process are always key considerations when assessing a request for investigative material. The provider under investigation has a right to be informed of the issues being investigated, and have enough information to respond to those issues. All relevant information is released to enable the provider to be fully informed about the issue being investigated and on which their comments are sought. However, it is important to note that my inquiries are focused on fact-finding, and we do not have the opportunity to cross-examine witnesses to test their evidence, so it is critical that the evidence we obtain is untainted. If providers under investigation were

[1] [1988] 1 NZLR 385.

to have access to all the information gathered during my investigation *before* I have concluded my inquiries, the investigation process could be prejudiced.

I consider it essential that HDC has the ability to withhold information gathered during the course of an investigation, to prevent contamination of evidence. Issuing opinions on breaches of the Code are a key aspect of my role as Commissioner and the process for determining the facts of these opinions must be robust. I note *Office of the Ombudsmen Case Note W47333 (2007)*, which reports on the Ombudsman's decision that withholding information on the basis that releasing would be likely to undermine or prejudice ongoing inquiries is a sufficient reason to withhold that information under section 6(c) of the OIA.

Timeliness of HDC investigations

The management of information requests during an investigation also diverts HDC's resources and delays the progress of investigations. Significant delays can be caused by requests for information in the course of an investigation. The emphasis in the Act is on the consumer's right to have their complaint responded to and resolved in a *timely* manner. This can be achieved without sacrificing fair process for providers.

For example, section 41 of the Health and Disability Commissioner Act 1994 requires me to notify the provider under investigation of the details of the complaint or the subject matter of the investigation, and the provider then has the right to respond within 15 working days. Disclosure of information other than that required to inform the provider of the details of the complaint or subject of the investigation, should he or she request further information, could delay the response. The statutory timeframe in section 41 would effectively become meaningless if providers could request all information gathered at that point.

Releasing information such as other providers' responses during the early stages of an investigation also results in disputes and submissions on the content of those responses, resulting in time and resources being diverted to respond to issues that are irrelevant to the outcome. In my view, requests for information are often a tactical response by providers' lawyers.

Previous consideration of this issue

This approach has been the subject of discussions with the Office of the Ombudsmen (Ombudsmen) in the past. My discussions and correspondence with former Chief Ombudsman Sir Brian Elwood in early 2001 supported this approach and recognised the importance of not releasing certain documents during an investigation. As a result of a complaint made in mid 2008, the Office of the Ombudsmen is again considering this issue. To date HDC has not received a decision on this complaint.

In the recent Review of the HDC Act and Code, [2] I recommended that the Health and Disability Commissioner Act 1994 be amended to allow information gathered during an investigation to be withheld, while the investigation is ongoing. The majority of submissions I received on this point were in favour of this amendment (33 out of 41 submissions). The Privacy Commissioner, who has a similar in section 55(e) of the Privacy Act 1993, was in support of the proposed amendment. Discretion should be retained to release information were it is necessary to give proper effect to the Act,

[2] *A Review of the Health and Disability Commissioner Act 1994 and Code of Health and Disability Services Consumers' Rights: A Report to the Minister of Health* (June 2009), available from http://www.hdc.org.nz/publications/review-act-code-09

and all relevant information would continue to be released to the appropriate parties when a provisional decision is reached, to fulfil natural justice requirements.

The Ministry of Health has consulted the Ombudsmen about my recommendation to amend the Act to allow for the withholding of information during an investigation. I have been advised that the Ombudsmen are not opposed to the idea of the recommendation, but are strongly opposed to an amendment being made to the HDC Act. They expressed a preference for a submission to this effect to be made as part of the review of the official information legislation.

In accordance with the HDC Act, public interest and to bring HDC in line with an equivalent statuary office, the Privacy Commissioner, I consider that section 6(c) of the OIA should be clarified to permit withholding of information during an investigation.

Compatibility of different information disclosure regimes

Privacy Act 1993/OIA relationship and section 48 immunity

In order to have jurisdiction over a complaint, health or disability services must have been provided to an identifiable health or disability consumer. While assessing a complaint HDC frequently obtains clinical notes and other sensitive personal information from health and disability service providers. This results in files containing sensitive health or other personal information. This raises an issue as to whether the OIA or the Privacy Act is applicable to a request, or both.

The way in which the two Acts are intended to interact in relation to personal information is unclear. Particular difficulties arise when the scope of a request includes personal information about someone other than the requester.

This issue was considered by French J in the High Court in *Director of Human Rights Proceedings v Commissioner of Police*, an appeal from a decision of the Human Rights Review Tribunal (**attached** for your reference).[3] The case concerned the release of personal information to a third party. It was claimed that the release of the information was a breach of Principle 11 of section 6 of the Privacy Act 1993. In defending the claim the police sought to rely on section 48 of the OIA and section 7(1) of the Privacy Act 1993. Section 48 confers immunity from civil and criminal liability where information is released pursuant to the OIA in good faith. The immunity serves an important function: ensuring that officials are not inhibited from releasing information. Section 7(1) is a savings provision to the effect that nothing in Principle 11 derogates from any provision in another enactment which authorises or requires personal information to be made available.

The main objective in bringing the appeal was to obtain clarification about the interface between the two Acts. The decision indicated that organisations subject to the OIA should consider all requests for information under the OIA alone, unless the request is for a person's own personal information. However, this was a test case and there remains a general lack of clarity about the interface between the OIA and the Privacy Act 1993. It was noted by the High Court that while a decision to *withhold* information can be the subject of a complaint to the Ombudsmen, there is no equivalent complaints procedure if information is *released* which should have been exempt from disclosure, unless such release was in bad faith. Conversely, the Privacy

[3] *Director of Human Rights Proceedings v Commissioner of Police* (unreported, High Court, Christchurch, 14 August 2008, CIV-2007-409-002984) French J.

Act provides for the ability to complain if personal information is released improperly.

As HDC frequently receives requests for information from third parties, I consider this an important issue for consideration in the review of both official information and privacy legislation. HDC currently does not have an established approach to this situation, but generally attempts to gain the consent of the person who is the subject of the information when dealing with a request for personal information from a third party. However, the situation becomes even more complicated where the person who is the subject of the personal information requested has died or become incapacitated.

Role of the Ombudsmen

Although I consider the dual educative and complaints resolution functions of the Ombudsmen to be appropriate in theory, in practice I have observed some difficulties. HDC has experienced considerable delays in the processing of OIA complaints by the Ombudsmen. This seems to be exacerbated by the current view of the Ombudsmen that they have a limited discretion as to whether to commence an investigation into a complaint. In addition, some decisions are not accompanied by reasons, limiting the educative potential flowing from complaints.

Conclusion

I commend the Law Commission's examination of official information legislation. It is vital that these important statues reflect the changing context in which they are applied. I hope my comments are of assistance.

I look forward to reading the Law Commission's Issue Paper on this topic.