

# **HOW THE NEW ZEALAND OMBUDSMAN EFFECTIVELY PROVIDES COVER FOR THE HDC – AN INFORMATION REQUEST COMPLAINT CASE**

**A report on how the N.Z. Ombudsman has rebuffed an Official Information Act 1982 (OIA) complaint and offloaded a Privacy Act 1993 (PA) complaint against the Health and Disability Commissioner (HDC) – showing how slim chances requesters and complainants have to get information, transparency and accountability from the HDC!**

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**Please note:**

Where references are made to the Ombudsmen Act 1975, the version valid for the period covering the time of the complaint and its processing does apply!

**PART 1 - INTRODUCTION**

This report (and ‘post’) covers and presents very interesting, revealing correspondence and developments that occurred after an earlier complaint had been made to former Chief Ombudsman Beverley Wakem - against the Health and Disability Commissioner (HDC). That previous complaint and its outcome were already reported on in quite some detail in an earlier ‘post’ on ‘nzsocijusticeblog2013’ under the following title and link:

***‘THE NEW ZEALAND OMBUDSMAN: “FAIRNESS FOR ALL” - AN EMPTY SLOGAN FOR SOME’***

<https://nzsocijusticeblog2013.wordpress.com/2016/07/24/the-new-zealand-ombudsman-fairness-for-all-an-empty-slogan-for-some/>

That particular complaint did bring to the attention of the then Ombudsman very questionable ‘complaints resolution’ practices by the HDC, by using ‘discretion’ to take no action, which appears to be a very frequent step for the HDC to take, in the case of many complaints filed with his Office. There are also two older posts found on this Blog, which cover the two complaints a complainant had made to the HDC, and **they are found under these links:**

<https://nzsocijusticeblog2013.wordpress.com/2016/03/28/how-the-hdc-throws-out-valid-complaints-and-protects-code-breaching-health-professionals-a-true-story/>

<https://nzsocijusticeblog2013.wordpress.com/2015/10/04/how-the-n-z-health-and-disability-commissioner-let-off-a-biased-designated-doctor/>

**The new complaint made to the Office of Ombudsmen by the same complainant, based on unsatisfactory OIA and PA responses by the HDC**

Extremely dissatisfied with the outcomes of those earlier well documented and well presented complaints, which he had made to two of New Zealand’s most senior so-called ‘watchdogs’, the complainant, who wishes to remain anonymous, followed up his earlier efforts to hold the HDC to account, by requesting further information under the Official Information Act 1982 (OIA) and the Privacy Act 1993 (PA).

Upon receiving some revealing new information with a first response (while other information was being withheld) from the HDC in late November 2015, the information requester and complainant made a number of follow up requests under the OIA and PA, which were left unanswered for months. After sending reminders, these requests were later replied to by the HDC’s Office with some rather unconvincing explanations, and with the continued withholding of certain specified information.

**The requester asked the HDC for the release of three letters** (besides of other information):

**1.** A letter dated 16 Aug. 2010, to which a Designated Doctor acting for Work and Income NZ (WINZ) had referred to in his letter to the HDC, dated 20 Sept. 2012, defending his actions as a doctor complained about;

2. a letter dated 29 January 2015, which contained complaint- and personal information of the requester, which he had in mid 2012 presented to the HDC, and which the then Deputy HDC had sent to the Medical Council of New Zealand (MCNZ);
3. a letter dated 4 June 2015, with which the MCNZ had replied to the information and matters referred by the former Deputy HDC to the MCNZ on 29 Jan. 2015.

Given the authors and/or recipients of the letters, the apparent types of letters, the likely covered topics, the contents, the relevance and the context of the correspondence, the requester considered that the release of that information was not only of his interest, but also in the public's interest.

Furthermore did the requester ask the HDC for information on - and explanations for - an incorrect phone log, created around 11.39h on 9 Aug. 2011 by an Assessor at the HDC, which had not been released in response to a number of OIA and PA requests by the complainant over the years since 4 March 2012, until it was suddenly presented after 17 Nov. 2015.

The HDC repeatedly withheld the asked for letters pursuant to section 9(2)(a) OIA, and provided unsatisfactory, unconvincing answers re the incorrect, allegedly wrongly placed and only after a long delay released phone log. At first the HDC firmly refused making available the letter of 16 August 2010, even in redacted form, and later also the two other letters.

In the end the very disappointed information requester did on 9 March 2016 file a new complaint with the Office of the Ombudsmen, challenging the decision by the HDC to withhold that particular letter of 16 August 2010, which he had asked for, and also disputing the correctness of explanations by the HDC Office's Associate Commissioner Katie Elkin - in a letter she wrote and signed 19 Feb. 2016. That was in relation to the controversial phone log of 9 Aug. 2011, kept in one of his HDC complaint files.

A further complaint matter was soon added to the same complaint after 12 April 2016, being the one about the two other letters of 29 Jan. and 4 June 2015, because the HDC also refused to make that further information available, again relying on section 9(2)(a) OIA.

As so often, it took the Ombudsmen's Office well over a year to assess, investigate and 'resolve' the complaint, by initially providing 'provisional opinions', and later 'final opinions'. But in the process they had at first also referred a part of the complaint (re the phone log) to the Office of the Privacy Commissioner (OPC, PC), as it was claimed that 'personal information' related complaints fell outside the 'jurisdiction' of the Ombudsmen.

Instead of providing overly extensive descriptions and explanations of the processes following the requests to the HDC, of the delays experienced and of the presentation, considerations and outcomes of the complaints made to the Ombudsmen, we will in this post keep this report as brief as possible. That said - it is inevitable that some extensive reading is required to understand and appreciate the still complex matters at issue.

The correspondence is mostly self explanatory, and the reader will understand the importance of the issues raised, the arguments presented and the sometimes bizarre, in our view partly unconvincing 'opinions' formed by the Ombudsman on this complaint matter under their reference 42xx2x.

All the relevant and significant correspondence will be made available in the form of PDF files containing the partly redacted scan copies of authentic documents, and of authentic text of letters sent to the ‘watchdogs’, which can be loaded by clicking links that are shown.

What should become very clear to the reader is the fact, that the Ombudsman handling this case appears to have made every effort to interpret and apply statute and other law in a manner, where this effectively offers a high degree of protection to the HDC, rather than assisting the requester and complainant in getting access to information, which would have offered more transparency in how the HDC operates.

The Ombudsmen and their employed investigators do at least at times seem to show insufficient commitment to seriously and robustly investigate complaints such as these. The impression given to the complainant - and many readers, is that the Ombudsman has effectively provided cover for the HDC, to protect him and his staff from serious challenges. We leave it to the reader of this report, to make her/his own conclusions on the matter.

## **PART 2 – THE OIA AND PA INFORMATION REQUESTS MADE TO THE HDC ON 19 OCT. 2015**

Determined to obtain all available information, which he may not have received before on two complaints he had made to the HDC, the requester and complainant did on 19 October 2015 send the following information request to the HDC Office:

<https://nzsocijusticeblog2013.files.wordpress.com/2016/03/hdc-c11hdcxxxxx-c12hdcxxxxx-o-i-a-priv-act-rqsts-new-anon-19-10-15.pdf>

The request for specified information in relation to earlier complaints ‘C11HDCxxxxx’ and ‘C12HDCxxxxx’ was sent by email. It covered authentic copies of correspondence, reports, notes and transcripts, also in the form of phone logs, and other specified information, which had been added to, created for, exchanged and kept in his complaint file C11HDCxxxxx in the time between 8 and 16 August 2011. It also covered photo copies, printouts and so forth of written correspondence and attached documents received by the HDC from Dr. Dxxxx Xxxxxxxx in relation to complaint C12HDCxxxxx, particularly such dated 20 Sept. 2012, in which a mention was made of a letter of 16 August 2010, which he also asked to be provided. He also sought an explanation why a letter by that same doctor, dated 22 Nov. 2012, had been made available with the Deputy HDC’s first decision on that complaint, and why the one dated 20 Sept. 2012 was not made available for nearly a year after that.

When the requester noticed that he had made a mistake with a date in that letter of request, he sent one follow up email in the early evening of 23 Oct. 2015, pointing out that the first HDC decision on complaint ‘C12HDCxxxxx’ was actually dated 24 April 2013, not 24 February 2013, as he had wrongly written under his request point ‘C’.

For the purpose of providing sufficient reference material, here is a scan copy of the redacted complaints decision letter by former Deputy HDC Theo Baker, dated 24 April 2013:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/hdc-complaint-winz-design-dr-hdcs-1st-decsn-compl-hilit-anon-t-baker-24-04-2013.pdf>

### **PART 3 - THE HDC'S FIRST RESPONSE TO THE OIA AND PA REQUESTS**

On 20<sup>th</sup> Nov. 2015 the requester received a letter by post, which was dated 17 Nov. 2015, from the HDC's Principal Legal Advisor Helen Davidson, who provided the following response to his information requests (here partly redacted for privacy reasons):

<https://nzsocijusticeblog2013.files.wordpress.com/2016/05/hdc-c11hdcxxxxx-c12hdcxxxxx-oia-priv-act-rqsts-19-10-hdc-1st-reply-anon-17-11-15.pdf>

Some of the information was provided without any apparent concern by the HDC's Legal Advisor, particularly in the form of some documents relating to complaint C11HDCxxxxx. But other information was withheld by the Advisor, such as the one letter dated 16 Aug. 2010, referred to in a complained about doctor's letter to the HDC of 20 September 2012. It was of special interest to the complainant, as he expected it would quite likely contain some kind of 'guidance' or references, which the former Deputy HDC used in deciding on his complaint C12HDCxxxxx. It appeared to be a letter that the former WINZ Designated Doctor Dxxxx Xxxxxxx considered of real relevance when he asserted, that a complaint made against him to the HDC, should instead rather be dealt with by a so called 'Medical Appeals Board'. But it was withheld pursuant to section 9(2)(a) OIA.

The partly redacted scan copies of the two letters by that Designated Doctor to the HDC, which were in un-redacted form also released to the requester, can be found via these links:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/hdc-complaint-design-dr-winz-design-dr-reply-report-to-hdc-hilit-anon-20-09-12.pdf>

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/hdc-complaint-design-dr-drs-ltr-to-hdc-defending-conduct-anon-hilit-22-11-2012.pdf>

What the complainant would also find in the documents relating to his earlier complaint 'C11HDCxxxxx', was a phone log for a phone call he had received from a Complaints Assessor at the HDC on 9 August 2011. That log contained some details that did not correspond with the actual contents of that phone conversation, of which he had himself kept a record, and which he still remembered. Also was there irritation about a 'edit' note at the bottom of that record, which raised further questions about the HDC and his staff.

An anonymised scan copy of that HDC 'phone log' is found via the links shown here:

<https://nzsocijusticeblog2013.files.wordpress.com/2016/03/hdc-complaint-wdwb-counsellor-priv-act-release-changed-ph-log-anon-09-08-2011.pdf>

<https://nzsocijusticeblog2013.files.wordpress.com/2016/03/hdc-complaint-wdwb-counsellor-priv-act-release-changed-ph-log-hi-lit-09-08-11.pdf>

### **PART 4 - FURTHER OIA AND PA REQUESTS MADE TO THE HDC FROM 24 NOV. 2015 TO 15 FEB. 2016**

On 24 Nov. 2015 the requester and complainant wrote to the HDC again, stating in a letter sent by email that he saw good reasons to have the HDC release a copy of the so far withheld letter dated 16 Aug. 2010, which had been referred to by a doctor he had complained about. He considered that letter to be of significant relevance to his complaint C12HDCxxxxx, and to how a view and decision had been formed on it. He commented that the doctor who had referred to that letter appeared to have been under the impression that it was relevant to the

complaint made against him. Also did the requester stress there was a strong public interest in sufficient transparency, as to what important information the HDC uses when considering complaints. The requester considered that in order to address any privacy concerns, the personal details of other persons could be blackened or whitened out.

He also sought clarifications re the conflicting, incorrect information in that now released phone log for a call a HDC Assessor had made to him at about 11.39am on 9 August 2011. He wrote that the HDC staff member appeared to have later altered the phone record, possibly to protect himself from legal challenges to his earlier comments - or the contents of the phone conversation he had with the complainant. The Assessor had repeatedly asserted that emails which the complainant had sent were 'freezing' the HDC Office's computer, while other email evidence showed that another staff member (Kerry Norman, Executive Assistant) had confirmed that all emails of the complainant in the complaint case C11HDCxxxxx had been received and internally been passed on. The requester and complainant pointed out, that he was never provided this log upon the repeated earlier OIA and PA requests he had made.

A redacted copy of the requester's further request is found by clicking this link:

<https://nzsocialjusticeblog2013.files.wordpress.com/2016/03/hdc-c11hdcxxxxx-c12hdcxxxxx-complaint-abt-changed-ph-log-09-08-11-anon-24-11-15.pdf>

The HDC's earlier OIA and PA response to the complainant, dated 23 March 2012 (one of a number of requests that followed), can be found as redacted scan copy via this link:

<https://nzsocialjusticeblog2013.files.wordpress.com/2016/03/hdc-complaint-wdhb-counsellor-hdcs-priv-act-reply-l-wadsworth-23-03-2012.pdf>

The complainant's earlier OIA and PA request, dated 04 March 2012, asking for a wide scope of information to be provided by the HDC, can be found via this link:

<https://nzsocialjusticeblog2013.files.wordpress.com/2016/03/hdc-complaint-c11hdcxxxxx-wdhb-counsellor-o-i-a-priv-act-rqst-anon-04-03-2012.pdf>

On 25 Nov. 2015 the requester sent one follow up email, pointing to a minor mistake in his letter (the 2<sup>nd</sup> section on page 1, as he put in the wrong year '2015' in a date, which should have read '2012'). A corrected letter was then also sent to the HDC by post.

As there was no response forthcoming from the HDC Office, the requester and complainant wrote to the HDC yet again - by email and attached letter, dated 15 Dec. 2015. That letter was basically nothing more than a reminder of the request letter dated 24 Nov. 2015.

The complainant's and requester's redacted letter dated 15 Dec. 2015 is found via this link:

<https://nzsocialjusticeblog2013.files.wordpress.com/2016/03/hdc-c11hdcxxxxx-c12hdcxxxxx-complaint-abt-changed-ph-log-09-08-11-anon-ltr-15-12-15.pdf>

An unnamed staff member at the HDC Office responded with a brief email on 16 Dec. 2015, confirming receipt of the last letters (since 24 Nov.) of the requester, and promising a reply to them once they had had '*a chance to consider*' the matters raised. The person wrote: "*We note this is likely to be sometime in January 2016*".

But after waiting another two months, and having received no reply at all from the HDC Office, the complainant and information requester started losing his patience, so he wrote yet

another letter to the HDC and their Principal Legal Advisor, dated 15 Feb. 2016. Once again he reminded the HDC staff of his earlier requests, and he mentioned the brief response received from their Office by email on 16 Dec. 2015. He sent it off by email, which carried a PDF file with the formal letter, again seeking the same information he had repeatedly asked for on 24 Nov. and 15 Dec. 2015.

The partly anonymised letter by the requester dated 15 Feb. 2016 is found via this link: <https://nzsocijaljusticeblog2013.files.wordpress.com/2016/03/hdc-c11hdcxxxxx-c12hdcxxxxx-complaint-abt-changed-ph-log-09-08-11-anon-new-ltr-15-02-16.pdf>

Besides of reiterating what he had written in earlier letters, the requester expressed his frustration and his dissatisfaction with the delay in responding. Hence he did now write that he would expect a written reply by 29 Feb. 2016.

## **PART 5 – THE HDC’S REFUSAL OF INFORMATION - AND BIZARRE DENIAL OF ALLEGED STAFF FAILURES OR MISCONDUCT**

The complainant and information requester did on 22 Feb. 2016 suddenly get a response from the HDC to his recent request letters in the post, which was dated 19 Feb. 2016.

Now it was the Associate Commissioner, in charge of ‘Legal and Strategic Relations’, Dr Katie Elkin, who responded to the complainant, like she had done on some earlier occasions. Dr Elkin upheld the HDC Office’s earlier decision to withhold a letter dated 16 Aug. 2010 according to section 9(2)(a) OIA, to which a complained about doctor had referred during the processing of an earlier complaint under ref. C12HDCxxxxx.

She quoted their Principal Legal Advisor Helen Davidson and what she wrote in her earlier letter dated 17 Nov. 2015. Ms Elkin also wrote: *“The additional information contained in this document is such that the privacy interests of other individuals cannot be addressed in the way you suggest.”* She added: *“Should you have any outstanding concerns relating to the decision to withhold the information, these can be raised with the Office of the Ombudsmen.”*

On the complainant’s comments regarding the file notes in the phone log - made by the HDC Assessor on 9 Aug. 2011, and ‘edited’ later, Ms Elkin commented the following:

*“As is evident from the file note, this was originally lodged under a previous complaint you had made to this Office, but was loaded under C11HDCxxxxx in March 2012. I understand that it is for this reason that the date “6 March 2012” is present on the file note; this was the date on which a file note was transferred to file C11HDCxxxxx once it became apparent that the file note had been placed on an older file. While it is clear that the file note was moved to the appropriate file, there is nothing to indicate that it has been improperly altered by Mr Xxxxxx as you allege.”*

She also commented further down in her letter: *“I note that the file note did not fall within the ambit of previous information requests you have made to this Office, with the exception of your request of 4 March 2012. Unfortunately it was not evident at that point that the file note in question had been placed on the file for a previous complaint you had made.”*

Ms Elkin’s letter can be found via these links:

<https://nzsocijusticeblog2013.files.wordpress.com/2016/03/hdc-c11hdcxxxx-c12hdcxxxx-oia-priv-act-rqsts-19-10-hdc-reply-19-02-16.pdf>

<https://nzsocijusticeblog2013.files.wordpress.com/2016/03/hdc-c11hdcxxxx-c12hdcxxxx-oia-priv-act-rqsts-19-10-hdc-reply-hilit-19-02-16.pdf>

The complainant was not convinced by any of the explanations that were given to him, as they were not logical and appeared to rather be attempts to obfuscate or to simply refuse proper answers. This will become apparent from further correspondence that we have in relation to this complex matter.

## **PART 6 - THE FIRST OIA AND PA COMPLAINT AGAINST THE HDC - MADE TO THE OFFICE OF OMBUDSMEN (09.03.16)**

Consequently the information requester, and again turned complainant, wrote a formal complaint to the Office of Ombudsmen, in order to seek a review of the decisions the HDC Office's Legal Advisors and Associate Commissioner had made on his repeated requests for information and the clarification of disputed matters. He asked for the Ombudsman's urgent assistance in a matter that was also in the public interest.

The authentic text of the complainant's letter to the Ombudsmen, dated 9 March 2016, with some redactions, can be found via this link:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-info-withheld-ltr-anon-09-03-2016.pdf>

After presenting his detailed complaint, by providing a background to the matters, and then pointing out the relevant issues, the complainant asked the Ombudsman to assist by asking the HDC to present the sought information and further explanations to his Office, and to then assess all details and make a recommendation that it be released to him as complainant. Personal details of other individuals could be concealed, he wrote. The letter of 16 Aug. 2010, referred to by doctor Xxxxxxx, was relevant to the handling and decision forming of his complaint under the HDC's reference C12HDCxxxx, he considered. As the complainant he would have a special personal interest in the contents and significance of the letter, he wrote. He also mentioned how the doctor he once complained about had referred to that letter in his email report to the HDC of 20 Sept. 2012, and how he appeared to consider it of relevance to the complaint made against him. The complainant considered also that the letter dated 16 Aug. 2010 would be of public interest. The public would have an interest in what information the HDC used to base its decisions on, he added. It appeared to the complainant that the letter contained some kind of guideline information the HDC used, for making decisions on certain complaints, like such about third party medical assessors. A reasonable degree of transparency and accountability should be expected of the HDC, he wrote.

As for Ms Elkin's comments re the phone log record, the complainant made clear that he was unconvinced by these, as they made no sense. He pointed out that an information request he made on 4 March 2012 was not responded to until 23 March 2012, and that the information must have been available upon the request, prior to collating the later sent information. He also considered that two other OIA and PA requests he had made to the HDC up to Oct. 2013 should have covered and included the same information.

He considered the log was withheld earlier for ulterior motives. He wrote that it was scandalous that the HDC only presented this information to him in late Nov. 2015, years later.

Substantial evidence (19 to 20 attached PDF files) was provided with his complaint, including earlier correspondence with the HDC Office and some copies of documents received earlier, and also official information he obtained from the Ministry of Social Development (MSD) on the actual jurisdiction and responsibilities of so-called 'Medical Appeals Boards'.

The complainant did on 11 April 2016 receive an initial response from the Office of Ombudsmen by email, with an attached letter signed on behalf of Ombudsman Leo Donnelly, which can be found via this link:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqst-refusal-delay-ltr-anon-11-04-16.pdf>

Here is just **some of the relevant evidence the complainant had sent the Ombudsmen** with his letter, some again in partly redacted, anonymised form, found via these links:

<https://nzsocijusticeblog2013.files.wordpress.com/2016/03/hdc-complaint-wdwb-counsellor-priv-act-release-changed-ph-log-anon-09-08-2011.pdf>

(see attachment 17)

<https://nzsocijusticeblog2013.files.wordpress.com/2016/03/hdc-complaint-c11hdcxxxxx-wdwb-o-i-a-priv-act-rqsts-anon-24-06-2013.pdf>

(see also attachment 19)

<https://nzsocijusticeblog2013.files.wordpress.com/2016/03/hdc-complaint-c11hdcxxxxx-wdwb-o-i-a-priv-act-rqsts-new-anon-07-10-2013.pdf>

(see also attachment 20)

<https://nzsocijusticeblog2013.files.wordpress.com/2015/03/medical-appeals-board-board-members-information-pack-for-release-july-2013.pdf>

(see attachment 9)

<https://nzsocijusticeblog2013.files.wordpress.com/2015/03/msd-medical-appeal-board-resource-for-bd-members-manual-undated-recd-jan-2012.pdf>

(see attachment 10);

(some of the other files sent are in part already available via links provided further above).

## **PART 7 - ANOTHER OIA AND PA REQUEST TO THE HDC OF 13 MARCH 2016**

As the information requester and complainant had remaining other concerns about the HDC and their handling of his complaints, and also about his recent information requests, he decided to follow matters up with a new OIA and PA request dated 13 March 2016.

He requested information on whether the HDC Office held any photos of him, as he was once photographed when holding a kind of picket or protest outside the entrance to the HDC's Office at 45 Queen Street in Auckland in September 2013. He believed that it was an HDC staff member, who took a photo of him, and that it must have been filed away.

The complainant also asked for information on whether at any time since he filed the complaint under the HDC's reference C12HDCxxxxx any information had been exchanged by the HDC staff about his complaint, and any related matters, with any persons working for the Ministry of Social Development (MSD) and/or the Medical Council (of New Zealand).

A PDF with the authentic, but partly anonymised request letter is found via this link:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/hdc-complaint-c12hdcxxxx-oia-pa-rqsts-complainant-rqst-ltr-anon-13-03-16.pdf>

## **PART 8 - THE HDC'S RESPONSE TO THE INFORMATION REQUEST OF 13 MARCH 2016**

With a letter dated 07 April 2016 the new Senior Legal Advisor to the HDC, Sxxxxxxx Xxxxx, responded with the following information. She wrote that she was unable to locate any photos of the complainant on the complaint files.

Re complaint C12HDCxxxxx she informed the information requester that:

*“HDC wrote to MCNZ on 29 January 2015 enclosing a copy of your complaint, Dr Hxxxxxx’s response to your complaint and the decision letter relating to your complaint. MCNZ wrote to HDC on 4 June 2015 stating that MCNZ’s Complaints Triage Team had considered the information provided by HDC and other information and decided to take no further action on the concerns raised. Those letters, dated 29 January 2015 and 4 June 2015, are withheld pursuant to section 9(2)(a) of the Official Information Act in order to protect Dr Hxxxxxx’s privacy.”*

The complainant and information requester was advised that he could seek a review of this decision from the Office of the Ombudsman or the Privacy Commissioner.

A PDF with the scan copy containing the authentic, partly anonymised text of this response by the HDC can be found via this link:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-ltr-to-complainant-oia-pa-reply-anon-07-04-16.pdf>

## **PART 9 - THE SECOND OIA AND PA COMPLAINT AGAINST THE HDC – MADE TO THE OFFICE OF OMBUDSMEN (12.04.16)**

So the complainant faced yet another situation, where he was refused access to information that he also considered to be ‘personal’, under section 9(2)(a) of the OIA. He therefore saw a need to write again to the Office of Ombudsmen, to raise the matter with them. He sent a complaint letter dated 12 April 2016 to the Ombudsmen, describing the additional issue he now had with the HDC. The requester and complainant stated that the HDC had no reason to withhold the asked for letters dated 29 Jan. and 4 June 2015, as the identity of the named doctor was already known to him, in relation to the complaint C12HDCxxxxx. He expressed his personal interest in the letters, as they related to his complaint matter, and he was also having an interest in the consultation between the MCNZ and HDC on matters he had raised.

He also questioned why the HDC would pass on information about him and his complaint to the MCNZ well over a year after they closed his file, and to do so without notifying him. He raised issues with only parts of his complaints information having been sent to the MCNZ, as this made it impossible for the Complaints Triage Team of the MCNZ to make a fair and balanced assessment of the concerns and issues that he raised with the HDC mid 2012.

The complainant also wrote that there was growing public concern about how the HDC handled complaints, given media reports, and that affected persons had felt very dissatisfied and even angry with past HDC decisions on complaints. Hence there was a growing interest in how the HDC operates, communicates and consults with certain medical registration authorities, agencies and other stakeholders and how complaints were being 'resolved'.

Hence he asked the Ombudsman to make a recommendation to the HDC to release the requested correspondence between the HDC and MCNZ, in particular the letters dated 29 Jan. and 4 June 2015. He considered that according to section 9(1) OIA there was sufficient public interest for this to be done. Also did the complainant refer to Principle 6 provisions in the Privacy Act 1993 to have the HDC release his personal information. Last not least the complainant suggested that this matter be added to the new complaint 42xx2x. Relevant further documents were attached to the email carrying his letter in PDF file form.

The authentic complaint letter, partly redacted, dated 12 April 2016, is found via this link: <https://nzsocialjusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-refusal-further-ltr-anon-12-04-16.pdf>

By way of an email, received by the complaint at 13.08pm on 13 April 2016, the Ombudsmen Office would confirm receipt of his further letter dated 12 April 2016, and informed him, that the matter had been added to the same complaint under the Ombudsman's reference 42xx2x.

## **PART 10 – SUNDRY PARALLEL PA REQUESTS TO THE MCNZ - AND PA AND OIA REQUESTS TO THE HDC**

The complainant had little faith in getting any further information of relevance to the above matters from the HDC Office, and he considered that he may perhaps have a bit more success with requesting information from the Medical Council, under the provisions in the PA.

So on 15 April 2016 he wrote to the Chief Executive of the MCNZ, and referred to the limited information he had received from the HDC's Senior Legal Advisor with a letter dated 7 April 2016. Providing some information on the letters that were mentioned, and the complaint he had filed years before with the HDC, he requested confirmation of whether personal information on him was being held, and to have the two letters dated 29 Jan. and 4 June 2015 made available to him – pursuant to Principle 6 of the PA.

As there was no response forthcoming, he did on 18 May 2016 (by parcel post) send a traceable letter dated 17 May 2016 to the Chief Executive of the Council, requesting the same kind of personal information the MCNZ may hold on him, also mentioning his letter roughly a month earlier.

### **Further information received from the HDC**

On 9 June 2016 the complainant also sent another email to the HDC, with a letter in its attachment, requesting under the OIA and/or the PA a list of the individual documents (including correspondence) that were then kept on his file C12HDCxxxxx, and that were then

sent to the MCNZ with the letter dated 29 Jan. 2015. He also asked for what ‘other information’ had been referred to the MCNZ.

He also mentioned, that the HDC had in his view acted in breach of the HDC Act (s 34(3)), not notifying him of the complaint information referral.

On 11 July 2016 the requester and complainant received a further letter dated 7 July 2016 from the HDC’s Senior Legal Advisor Sxxxxxxx Xxxxx, listing the letters that had been sent to the MCNZ on 29 Jan. 2015. These included his ‘complaint dated 30 June 2012’, the doctor’s responses of 20 Sept. and 22 Nov. 2012 and the HDC’s decision dated 24 April 2013.

The Advisor refused the request for ‘other information’ pursuant to section 9(2)(a) OIA. She also wrote: *“As your complaint was not referred pursuant to section 34 of the Health and Disability Commissioner Act 1994, HDC did not inform you of our correspondence with MCNZ.”*

The authentic scan copy of this letter with some bits redacted is found via this link:

<https://nzsocijaljusticeblog2013.files.wordpress.com/2017/11/hdc-c12hdcxxxxx-pa-oia-rqsts-mcnz-info-referral-list-of-docs-reply-07-07-16.pdf>

There would be some later correspondence with the HDC Office, which would go beyond of this complaint matter and its handling by the Ombudsmen’s Office, so we will not present it here, as it only has some limited relevance. It must be said though, that requests were made to the HDC to have wrongly recorded, misrepresented and thus incorrect information sent to the MCNZ corrected. That was never done as the requester and complainant had requested, under the PA. It would later be considered with a separate complaint to the Privacy Commissioner.

### **Information made available by the MCNZ**

The complainant did after long delays though receive some documented information from the Medical Council, which they kept on file, that contained his personal information, but also that of other persons. Hence they only made available redacted information that was directly relevant to the complainant and information requester.

Under the PA the Council’s Team Manager – Professional Standards, provided the information requester with the redacted letter dated 29 Jan. 2015, which former Deputy HDC Theo Baker had sent to the Council’s Chairperson and Complaints Triage Team for review. Also attached was an ‘Appendix’ containing partly incorrect, misleading information about the complainant, and some documentation that had been sent with the referral letter from the HDC. What was also evident from the documentation received now was the fact that the doctor complained about, had been copied in on this referral per ‘cc’, while the complainant was never informed of this action. The complainant was more than disappointed by what he had now found out about the HDC and MCNZ exchanging only selected information without a complainant’s knowledge.

The information release by the MCNZ to the complainant, dated 09 June 2016, with a part of the whole set of redacted documents that include the HDC’s letter of 29 Jan. 2015 to the MCNZ, and an Appendix (more was released, but is not that relevant to this complaint):

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-mcnz-pt-info-release-hdc-ltr-anon-09-06-16.pdf>

Upon the involvement of the Privacy Commissioner, the complainant would later achieve that the MCNZ would also release the second letter he had requested, the one dated 4 June 2015, which the Council had sent to the HDC in response to their complaint information referral of 29 Jan 2015.

This later information release by the MCNZ, dated 01 Feb. 2017, including the redacted response letter to the HDC of 4 June 2015, can be found via this link:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/mcnz-pa-rqst-by-complainant-info-release-ltr-to-hdc-of-04-06-15-anon-sent-01-02-17.pdf>

The newly received information was of course of value and use to the complainant, but while he received it over time, he chose to let the Ombudsman investigation run its course, to see what their decision would be in regards to the action or inaction of the HDC in this matter.

## **PART 11 - FURTHER CORRESPONDENCE WITH, AND EVIDENCE PROVIDED TO, THE OFFICE OF OMBUDSMEN**

Upon sending in his first complaint letter to the Office of Ombudsmen, the complainant did on 11 April initially only get a brief email with an attached acknowledgment letter, dated 11 April 2016, confirming that an initial assessment had been made of his complaint. It was planned to be allocated to an investigator, but the writer warned, that due to the large volume of complaints their Office was receiving, there would be delays in progressing some complaints. The writer wrote on behalf of Ombudsman Leo Donnelly, that a member of their Auckland Office would contact the complainant, *'when there is progress to report'*.

An authentic scan copy of the Office of Ombudsmen's first response, dated 11 April 2016, and partly redacted, is found via this link:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqst-refusal-delay-ltr-anon-11-04-16.pdf>

A further email was received by the complaint at 13.08pm on 13 April 2016, confirming receipt of his further letter dated 12 April 2016 (see '**PART 9**' above), and informed him, the matter had been added to the same complaint under the Ombudsman's reference 42xx2x.

### **Delayed processing of the complaint/s**

It would take further significant delays in the processing of this complaint, and **it would not be any earlier than 8 March 2017, when the complainant did finally receive another email in this complaint matter**, with an attached PDF letter from Senior Investigator Fxxxx Mxxxx. It provided him with an update on the matter, informed him of the investigator assisting with the case, and briefly listed the points at issue, i.e. the letters dated 16 Aug. 2010, 29 Jan. and 4 June 2015 to be made available by the HDC, and somewhat incorrectly interpreted, the additional issue with the phone log of 9 Aug. 2011.

The Senior Investigator also wrote that she had written to the HDC, Mr Anthony Hill, and asked him to provide the requested information and a report to their Ombudsmen's Office.

The authentic scan copy of that letter to the complainant, partly anonymised, and dated 8 March 2017, can be found via this link:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-refusal-reply-anon-08-03-17.pdf>

A further email from the assisting Investigator Cxxxx Lxxxx-Xxxxx at the Auckland Office of the Ombudsmen was received by the complainant on 15 May 2017, which simply informed him that the Ombudsman had now received a report from the HDC together with copies of the information at issue. The material would be considered, she wrote.

After midday on 16 May 2017 the same Investigator wrote to the complainant again, asking the complainant about the letter dated 16 August 2010, that had been referred to by a doctor that examined him and whom he had complained about to the HDC. She asked whether the complainant could provide them with a copy of that letter by the doctor to the HDC, dated 20 Sept. 2012, in which he had referred to that particular other letter.

The complainant sent her a copy of that letter on the same day's afternoon, and the whole email correspondence from 16 May 2017, partly anonymised, can be found via this link:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-refusal-email-corresp-anon-16-05-17.pdf>

The following link shows again a redacted scan copy of the Designated Doctor's email letter and his brief, disputed, flawed report, that he sent to the HDC Office on 20 Sept. 2012:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/hdc-complaint-design-dr-winz-design-dr-reply-report-to-hdc-hilit-anon-20-09-12.pdf>

## **PART 12 - THE OMBUDSMAN OFFICE'S REFERRAL OF THE PA COMPLAINT TO THE PRIVACY COMMISSIONER AND THE COMPLAINANTS RESPONSE**

On 30 May 2017 the complainant received an email with an attached letter from the Office of Ombudsmen, which was from the Manager at their Auckland Office, Mr Sxxxxxxx, who is in charge of 'Investigations and Resolution'. He informed the complainant, that parts of his complaint relating to the phone log dated 9 August 2011 would need to be referred to the OPC. He explained this with their Office only having authority to deal with OIA information complaints. Complaints related to requests for personal information must be considered under the PA, he explained, and hence they had referred that part of his complaint to the PC. He wrote: "*Where a complaint relates to a matter that is more properly considered in terms of the PA, there is a legal duty to refer it to the Privacy Commissioner*". Mr Sxxxxxxx provided the contact details for the OPC.

In respect of '*storage of the information at issue*', the Manager of the Auckland Ombudsmen's Office referred the complainant to the Chief Archivist, who had the responsibility to ensure that the HDC would comply with the provisions of the Public Records Act 2005. Hence he also provided the address and contact details for that Office, suggesting the complainant should take his concerns about the phone log issue there.

Lastly the Manager wrote that finally '*good progress*' was being made in relation to the remaining complaint aspects.

The partly anonymised Auckland Ombudsmen Office Manager's letter of 30 May 2017 is found via this link:

<https://nzsocialjusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-refusal-pt-referral-pc-anon-30-05-17.pdf>

### **The complainant's response re the partial complaint referral**

This was not what the complainant had expected; it did once again appear like the Ombudsmen were 'off-loading' parts of his complaint, as they did not want to deal with it.

Hence on 6 June 2017, the complainant wrote back to the Ombudsman and his Auckland Office's Manager, responding to the referral of parts of his complaint(s). While he showed some understanding for having the complaint aspects about '*personal information issues*' referred to the PC, he expressed his concerns about the Manager's view, that particular other issues relating to the phone log could best be addressed by the Chief Archivist. He noted the Manager's reference to the '*storage*' issue.

He again pointed to the fact that there had been an extremely long delay in the HDC Office making the phone log of 9 Aug. 2011 available (over 2 and a half years after first requested), but stressed also, that the author of that log had told him something rather different in the phone conversation, than what he had recorded and apparently later edited in that log. He considered the HDC's Associate Commissioner's (Ms Elkin's) explanations in her letter of 19 Feb. 2016, for the late release of the log, re the 'edit' note, and other related actions and events, as not being credible. He pointed to evidence he had attached to his letter, and he considered that this was a matter involving very unprofessional conduct, dishonesty and serious breach of duty and more, by an HDC staff member. Once again he explained that it was simply not true, that his emails, which he sent to the HDC Office with a complaint on 8 August 2011, did '*freeze*' the HDC computer system. He attached the documented email evidence to his letter, showing all emails had been received by the HDC and passed on internally. He sent his email with this new letter and the attachments off on the same day.

So the complainant considered that these issues were not just matters that needed to be dealt with under the PA and Public Records Act, but that the Ombudsmen Office itself should also feel responsible for them to be investigated and addressed. He lastly asked that his letter, and previous correspondence in this matter, should also be sent to the Privacy Commissioner for consideration.

An authentic text copy of the letter sent by the complainant to the Auckland Ombudsmen Office, dated 06 June 2017, can be found via this link:

<https://nzsocialjusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-refusal-new-complainant-ltr-anon-06-06-17.pdf>

**Here are links to the types of evidence the complainant had attached to his email/s:**

<https://nzsocialjusticeblog2013.files.wordpress.com/2016/03/hdc-complaint-wdwb-counsellor-email-receipt-all-mails-confrmd-16-26h-08-08-11.pdf>

<https://nzsocijusticeblog2013.files.wordpress.com/2016/03/hdc-complaint-wdhb-counsellor-email-thanks-f-all-mails-confmd-hilit-16-46h-08-08-11.pdf>

<https://nzsocijusticeblog2013.files.wordpress.com/2016/03/hdc-complaint-wdhb-counsellor-complt-email-30-copy-anon-hilit-04-11h-08-08-11.pdf>

<https://nzsocijusticeblog2013.files.wordpress.com/2016/03/hdc-complaint-wdhb-counsellor-email-rqst-f-confirmed-receipt-15-09h-08-08-11.pdf>

**Here again, a scan copy with the partly redacted phone log of 9 Aug. 2011, with notes:**

<https://nzsocijusticeblog2013.files.wordpress.com/2016/03/hdc-complaint-wdhb-counsellor-priv-act-release-changed-ph-log-hi-lit-cmts-09-08-11.pdf>

### **Further correspondence with the Auckland Ombudsmen's Office**

The assisting Investigator at the Auckland Ombudsmen's Office did at 14.04h on 9 June 2017 confirm by email the receipt of that correspondence sent by the complainant.

At 15.50h on 17 June 2017 the complainant wrote again by email to the Manager for Investigations and Resolution at the Auckland Ombudsmen's Office, also in relation to his decision to refer a part of his complaint/s to the Privacy Commissioner. He informed the Manager of a response he had now received from the Office of the Privacy Commissioner, about which he was 'deeply disappointed'.

He provided Mr Sxxxxxx and the Ombudsman with a copy of an email letter from an 'Enquiries Manager' at the Office of the Privacy Commissioner, dated 16 June 2017, with which he had been informed that his complaint had only been treated as an 'enquiry', and that it was considered that it would not even be appropriate to investigate the matter in 2017.

It appeared the OPC staff had simply accepted the explanations given by the HDC's Associate Commissioner Dr Elkin in relation to the phone log in question, and her 'apology' to the complainant that it had not been provided earlier. The evidence presented by him as complainant (initially to the Ombudsmen's Office) appeared to have largely been ignored. It appeared to the complainant that the Ombudsmen's Office may not even have provided the OPC with all relevant correspondence and evidence, as the decision was so poorly explained and not backed up. The 'Enquiries Manager' at the OPC even wrote that their Office would '*not have jurisdiction to investigate the matter*'. This was most bizarre and lacked any sense.

The complainant also attached his response to the OPC, dated 17 June 2017, to the new email to the Ombudsman's Office, in which he expressed his disagreement with the OPC's decision. He provided yet further explanations and evidence, and questioned why the PC now considered they '*do not have jurisdiction to investigate the matter*'. With that letter to the OPC, the complainant did now also request information under the PA from the PC, including all correspondence received from the Ombudsmen's Office, internal file notes, and so forth.

The partly redacted email sent by the complainant to the Office of Ombudsmen in Auckland, dated 17 June 2017, can be found via this link:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-further-complainant-email-17-06-17.pdf>

The partly redacted email letter received by the complainant from the OPC on 16 June 2017, from an 'Enquiries Officer', announcing their 'considered' decision on the complaint referred to them by the Ombudsman, can be found via this link:

<https://nzsocialjusticeblog2013.files.wordpress.com/2017/11/priv-cmsnr-enq-12xxx-hdc-oia-pa-complaint-ref-by-ombudsman-dec-anon-16-06-17.pdf>

The authentic text of the complainant's letter to the OPC, in response to their decision not to investigate the complaint, now under ENQ-12xxx, dated 17 June 2017 is found here:

<https://nzsocialjusticeblog2013.files.wordpress.com/2017/11/priv-cmsnr-enq-12xxx-hdc-pa-complt-refd-by-ombudsman-reply-to-decn-anon-17-06-17.pdf>

Just before midday on 27 June 2017 the assisting Investigator in this complaint matter based at the Auckland Ombudsmen's Office wrote back to the complainant, acknowledging his last email from above, and commented that his concerns had been conveyed to Mr Sxxxxxxx, who would respond in due course.

At 20.52h on 27 June 2017 the complainant would then write back to the same Investigator and Mr Sxxxxxxx, thanking for the update, and expressing his view, that it appeared the OPC did not get all relevant letters he had sent to the Ombudsmen's Office in relation to the phone log issue. He attached a further letter which he had sent to the OPC, dated 17 June 2017, which had been resent to that Office, as a date in relation to a letter was wrong in the earlier one he sent.

With an email of 15.46h, 7 July 2017, an unnamed sender at the Office of Ombudsmen sent the complainant an email with the final confirmation that the part of his complaint, relating to the incorrect and for years withheld phone log of 9 Aug. 2011, was being referred to the Privacy Commissioner. A letter signed by Mr Sxxxxxxx was attached.

Mr Sxxxxxxx referred to the complainant's earlier emails (and letters) dated 6, 17 and 27 June 2017, and claimed he had 'reviewed' the 'emails and attachments'. He wrote that he would not be taking any further action in response. He asserted that the complaint about the phone log was about personal information, and would therefore have to be dealt with by the PC under the PA. He even wrote: "*An Ombudsman does not have jurisdiction to consider complaints about inaccuracies in personal information about individuals or delays in responding to requests for such information.*" Even when acknowledging that the complaint has asserted that the author of the log had 'falsified' it and deliberately withheld it, the Manager for Investigations and Resolution considered this was a matter for the PC to deal with.

Regarding the complainants new issues with the Privacy Commissioner, or rather their 'Enquiries Manager', the Manager wrote that the Ombudsmen's Office had forwarded documents 'relevant' to the complaint about the phone log to the OPC on 30 May 2017. Should the complainant wish the OPC to have correspondence he had prepared subsequent to that time, then he would need to write directly to the OPC, he wrote.

He again referred the complainant to the Chief Archivist to have any issues regarding the HDC's poor record keeping and so addressed. He closed his letter with the usual phrases, and added: "*Any future correspondence from you regarding HDC's phone log of 9 August 2011 will be read and placed on file but not responded to unless it raises new and separate issues*".

The Auckland Ombudsmen's Office Manager's letter dated 7 July 2017, in slightly redacted form, can be found via this link:

<https://nzsocialjusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-refusal-confirmd-pt-referral-anon-07-07-17.pdf>

**Author's own comments:**

And here we go again, the Manager, in charge of 'Investigations and Resolution' at the Ombudsmen's Auckland Office simply sweeps all the communicated concerns by the complainant aside, as he is not interested in his further evidence and arguments, and simply **covers** for the HDC and his staff, who will not wish to have anybody seriously investigate the repeatedly raised matters. Allegations of potential dishonesty and misconduct by an HDC staff member (e. g. the Assessor) appear not to be taken seriously, and instead, the matter is simply referred on to the OPC, so it is off the Ombudsmen's backlog. That is certainly one way of 'dealing' with a pile of complaints that built up over recent years, due to underfunding of the Ombudsmen's Office, and possibly other reasons.

**PART 13 - THE OMBUDSMAN'S FIRST PROVISIONAL OPINION OF 9 JUNE 2017 AND THE COMPLAINANT'S RESPONSE**

Only an hour and a half later, after receiving an email from the Investigator at 14.04h, which confirmed the receipt of the complainant's email and letter of 6 June 2017 (see above), the complainant did on 9 June 2017 receive another email from an unnamed person at the Office of Ombudsmen. He or she sent him an attached PDF file with a letter from Ombudsman Leo Donnelly, presenting his 'provisional opinion' on one remaining part of the complaint matter. This related to the complaint about the requested letter dated 16 Aug. 2010, which the HDC had withheld from the complainant.

Mr Donnelly wrote, having 'reviewed' an un-redacted copy of the letter, and having consulted with the Privacy Commissioner, he accepted that withholding the letter was necessary to protect the privacy of natural persons, and that section 9(2)(a) of the OIA applied. He wrote that he had pursuant to section 9(1) of the OIA also considered whether there were was a 'countervailing public interest' justifying the release of the letter. While he accepted there was a public interest in transparency in the HDC's decision making, he referred to what the HDC had previously written about that letter, and he also accepted that the HDC's advice to the complainant on the contents of that letter was '*correct*'.

He considered that there was no over-riding public interest in having the remainder of the letter released. He appeared to agree with the HDC, that the contents of that letter was such, that it could also not be provided in redacted form. He concluded that the HDC was entitled to refuse the complainant's request for the letter of 16 August 2016, to which a doctor had referred in his letter to the HDC (dated 20 Sept. 2012).

The complainant was invited to respond to his provisional opinion by 22 June 2017. Already in the early part of his letter, the Ombudsman had informed the complainant, that the other investigation in relation to his request for letters dated 29 Jan. and 4 June 2015 was ongoing.

The authentic scan copy of Leo Donnelly's letter dated 9 June 2017, with anonymised parts, can be found via this link:

<https://nzsocialjusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-refusal-pt-prov-opinion-anon-09-06-17.pdf>

## **PART 14 - THE COMPLAINANT'S FURTHER SUBMISSIONS AND EVIDENCE**

Already on 13 June 2017 the complainant responded to the provisional opinion by Ombudsman Donnelly. He sent in two emails, the second email having only one extra attachment to it, which was meant to replace one, sent earlier, which was not the correct one.

In his letter to the Ombudsman, dated 13 June, the complainant wrote that he would not retract from the concerns and the arguments he presented in earlier correspondence in relation to seeking the HDC's release of the letter of 16 Aug. 2010, with personal details of other individuals blackened or whitened out.

With his new letter he presented his remaining plus additional concerns, and restated the interests that he and the wider public should have in the release of that letter. He wrote that the letter was apparently of some relevance to the HDC when considering a decision on his complaint C12HDCxxxxx. Also did the reason that the former Deputy HDC Theo Baker gave, for not needing to investigate the complaint C12HDCxxxx (see her letter of 24 April 2013), resemble the considerations that the complained about doctor appeared to make, when referring to the letter of 16 Aug. 2016, so he wrote. Therefore the HDC should feel compelled to provide the transparency that must be expected, he commented.

Upon quoting parts of the provisional opinion of the Ombudsman, the complainant commented on the, in his view, attempted rebuttal by the HDC regarding the letter dated 16 Aug. 2016. He referred to the comments made by the Principal Legal Advisor of the HDC in her letter of 17 Nov. 2015, and he also quoted Associate Commissioner Katie Elkin, out of her letter dated 19 Feb. 2016.

He then presented some presumptions re who may actually be named in that letter, and what it may actually contain. The complainant believed a person holding a higher office may be mentioned. He also alleged that there was a form of 'collaboration' between the Ministry of Social Development (MSD), i.e. their Principal Health Advisor, and the HDC. The complainant pointed to an online document found via the web, which contained information that was indicative of this (see **this link and slide 23**, and also slide 16 re other matters of concern):

[http://www.gpcme.co.nz/pdf/2014%20North/Sat\\_Room6\\_1400\\_Bratt%20DD%20Training%20Workshop%20GP%20CME%202014.pdf](http://www.gpcme.co.nz/pdf/2014%20North/Sat_Room6_1400_Bratt%20DD%20Training%20Workshop%20GP%20CME%202014.pdf)

Pointing to certain evidence that showed that Dr Bratt, the Principal Health Advisor at MSD, had made repeated efforts to influence Designated Doctors, and medical professionals in general, the complainant also alleged, that he had made efforts to stop potential complainants from filing complaints with the HDC.

He also presented the following evidence from **an article in the New Zealand Medical Journal issue of 20 Nov. 2015**, which shows how MSD's Dr Bratt had used misrepresented information, based on wrongly interpreted statistical and other reports, to influence doctors:

<https://www.nzma.org.nz/journal/read-the-journal/all-issues/2010-2019/2015/vol-128-no-1425-20-november-2015/6729>  
[https://www.nzma.org.nz/\\_data/assets/pdf\\_file/0005/45905/Purdie-1874FINAL1425.pdf](https://www.nzma.org.nz/_data/assets/pdf_file/0005/45905/Purdie-1874FINAL1425.pdf)

The complainant again disputed assertions made by the former Deputy HDC that concerns he had raised in a complaint under ref. C12HDCxxxxx were best dealt with by a 'Medical Appeals Board' of WINZ. Expressing remaining concerns about the Office of the Ombudsmen supporting the HDC in withholding the letter, the complainant argued, that *"in order to get a better understanding and appreciation of the HDC's complaint handling practices and the guidelines their Office follows, it should for that reason alone be fair and reasonable to release that letter of 16 August 2016 in the requested redacted form."*

He added that he had suffered immensely as a consequence of a so-called Designated Doctor treating him wrongly and inappropriately while conducting an examination for WINZ. Some further evidence that was deemed relevant was again attached to the letter, for the Ombudsman to consider, together with the complainant's concerns.

The complainant asked that the Ombudsman advise the HDC to release the letter, as in his words: *"It should not be permitted that persons acting in their important, high level professional capacity are allowed to hide behind the privacy law when making potentially questionable statements or decisions on complaint handling processes or procedures"*. While he expected the release of a redacted copy, concealing personal information of other individuals such as complainants, he had earlier also indicated, that in his view certain high level persons that may be identifiable through the release of the letter, should not be protected. He suspected even, that Dr Bratt may be mentioned in that particular letter the Designated Doctor had referred to.

The anonymised letter by the complainant, dated 13 June 2017, can be found via this link:  
<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-refusal-complainant-reply-prov-dec-13-06-17.pdf>

After noting a couple of mistakes in his letter, the complainant did at 22.43h on 14 June send another email to the Office of Ombudsmen, referring to the two emails he sent the day before, and pointing out the mistakes. He had incorrectly mentioned a letter dated '18 Aug. 2010' in the title of his letter, which should have read **'a letter dated 16 Aug. 2010'**. He also pointed to a wrong letter having been sent with the first email, as attachment '2).' to the email he sent at 22.59h on 13 June, and would send the correct one attached to this additional email. He furthermore corrected a reference in his letter, to a page in a 'Medical Appeals Board manual', which should have read '4' instead of '14'.

With that email he did again send a copy of an email letter by the WINZ Designated Doctor to the HDC, dated 20 Sept. 2012.

An authentic, partly anonymised, scan copy of that email by the complainant to the Ombudsmen's Office in Auckland, dated 14 June, can be found here:  
<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-complainant-corr-email-anon-14-06-17.pdf>

On the following day, 15 June 2017, the complainant received two emails from the Investigator processing the complaint at the Office of Ombudsmen. At 08.10h she confirmed receipt of the complainant's email of 22.59h on 13 June, writing that Mr Donnelly would reply in due course. At 08.13h she wrote and confirmed the receipt of the complainant's email of 22.43h on 14 June 2017, writing that the *'amendments are noted'*, and that the correspondence received would now be read in light of the comments sent.

At 15.50h on 17 June 2017 the complainant wrote by email to the Manager for Investigations and Resolution at the Auckland Ombudsmen's Office, in relation to his decision to refer part of his complaint(s) to the Privacy Commissioner. Details re this correspondence and its contents are found under **'PART 12'** in this post.

## **PART 15 - THE OMBUDSMAN'S FIRST FINAL OPINION OF 29 JUNE 2017**

At 09.49h on 29 June 2017 the complainant received an email from an unnamed sender at the Office of Ombudsmen, which had a letter from Ombudsman Leo Donnelly attached. It was dated 29 June 2017 and contained his 'final opinion' on the first completed part of the complaint.

The Ombudsman thanked for the correspondence of 13 June 2017, which they had received from the complainant, and he wrote, that after considering the further comments by the complainant, and all the issues raised, he had formed the final opinion *"that HDC was entitled to refuse your request, on the bases that section 9(2)(a) of the Official Information Act 1982 (OIA) provides good reason to withhold the letter"*.

He then explained his considerations and views, confirming he had *'reviewed the information at issue'*. He critically remarked: *"I note your comments that individuals referred to in the letter should be named so that they can be held accountable for any comments made in relation to HDC's complaint handling processes"*.

Again, the Ombudsman mentioned, that he had also consulted with the Privacy Commissioner, as he was *'required to do'*. He then explained that he accepted that the letter dated 16 Aug. 2010, to which the doctor who had 'examined' the complainant had referred in a letter to the HDC, needed to be withheld, as it was *'necessary to protect the privacy of natural persons and that section 9(2)(a) therefore applies'*.

He rejected that there was overriding public interest to have the letter released by the HDC, and he expressed his view to the complainant, that *"the excerpt and explanation given to you by HDC provided sufficient information to contextualise Dr Hxxxxxx's reference to the 16 August 2010 letter in his response to your complaint"*.

Ombudsman Donnelly refused to make any comments on the remaining contents of that letter, and who may be mentioned in it. He also wrote: *"I note your concerns about the lawfulness, or otherwise, of HDC's approach to complaints involving doctors appointed by Work and Income New Zealand. However, this issue is outside the scope of my investigation and review of HDC's response to your requests under the OIA. I also note your comments in relation to Dr David Bratt, Principal Health Advisor to the Ministry of Social Development, and what"*

*you believe to be inappropriate attempts to influence HDC policy. Again, these issues are outside the scope of my investigation and review under the OIA”.*

**Author’s own comments:**

So there we have it again, like it happened in an earlier complaint about Dr Bratt deleting all emails for a period, which he had exchanged with senior advisors, and where Prof. Ron Paterson did as former Ombudsman see no need to investigate, here we have Mr Donnelly opt to act in the same manner, to take NO action about information presented to them.

**See these links showing earlier correspondence from Ron Paterson, dated 23 June 2015, 17 Aug. 2015 and 05 April 2016:**

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-3xxxxx-msd-o-i-a-fr-16-01-14-bratt-salary-del-emails-anon-ltr-05-04-16.pdf>

<https://nzsocijusticeblog2013.files.wordpress.com/2015/08/ombudsman-complaint-abt-dr-bratt-deleting-emails-refusal-to-investigate-r-paterson-17-08-15.pdf>

<https://nzsocijusticeblog2013.files.wordpress.com/2015/08/ombudsman-complaint-msd-o-i-a-rqst-16-01-14-dr-bratt-presentation-info-dec-23-06-15.pdf>

**And here is an authentic redacted letter, which the complainant sent to the Ombudsmen on 7 July 2015, raising concerns about MSD’s Principal Health Advisor deleting all emails he exchanged with a senior advisor, which Ron Paterson refused to investigate:**

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-o-a-complaint-msd-about-dr-bratt-deleting-public-records-letter-anon-07-07-2015.pdf>

Other info of interest: **An email of 23 Aug. 2016, announcing Leo Donnelly taking over from the suddenly resigned Ombudsman Ron Paterson:**

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsmen-office-of-complaint-36xxxx-msd-oia-info-w-held-email-hi-lit-23-08-16.pdf>

The Ombudsmen Act 1975 gives an Ombudsman the authority to start investigations “*of his own motion*”, as section 13(3) clearly provides for!

But this is not done, like in this case, while it may have exposed misconduct or worse by officials and employees working and acting in government organisations or departments, listed under Schedule 1 of the same statute. So the Ombudsmen appear to avoid opening a can of worms, and simply rather consider such matters are out of their scope of authority, their ‘jurisdiction’, or simply do not need to be investigated - for whatever other reasons. That is, unless there may be such a scandalous example of misconduct, of unacceptable, illegal actions or decision making, it would be impossible to ignore the issue, particularly when reputable first hand witnesses or whistle blowers exist. This tells us - and those with ample experience in dealing with the Ombudsmen, what the role of the Ombudsmen really is. It appears to us, as if the Ombudsmen rather choose to only act as a ‘watchdog’ intent on keeping complainants at bay, and to rather use information presented to them, to advise state departments, agencies and organisations falling in their jurisdiction, how they may need to ‘improve’ their actions and processes, to avoid future complaints. ‘*Fairness for All*’ sounds rather hollow a call to many complainants, when serious enough issues are not dealt with.

The letter dated 29 June 2017, with **Mr Donnelly’s first ‘final opinion’ on this complaint aspect**, in part anonymised, can be found via this link:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-refusal-part-decision-fin-opinion-anon-29-06-17.pdf>

## **PART 16 – THE OMBUDSMAN’S SECOND PROVISIONAL OPINION OF 8 SEPT. 2017**

After the above described partial ‘*resolution*’, and the referral of another part of the originally presented complaint matters, covered by the complaint reference 42xx2x, there was another delay as the complainant noted. Hence he did at 21.37h on 20 Aug. 2017 write to the Investigator working on the case, asking her, if she could provide him with an update. He noted that he had received some last correspondence from the Ombudsmen on 7 July 2017 see end of ‘PART 12’).

The complainant’s partly anonymised email enquiry dated 20 Aug. 2017 sent to the Ombudsmen’s Office can be found via this link:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-refusal-complainants-email-20-08-17.pdf>

At 07.44h on 21 Aug. 2017 the Investigator assisting with the complaint responded by email, writing that workload pressures at their Office had led to a delay in them writing to him again. She informed the complainant that a provisional opinion from the Ombudsman would be anticipated within 4 to 6 weeks.

Her partly redacted correspondence can be found in a PDF via this link:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-refusal-offices-email-upd-21-08-17.pdf>

At 07.54h on Friday, 8 Sept. 2017, the complainant received an email from an unnamed sender at the Office of Ombudsmen, which had a PDF with a letter from Mr Donnelly attached, bearing the same date.

As the Ombudsman, or his investigators, will have made some investigations and consulted with the HDC Office, they did find out, that the complainant had in the meantime, given the very long delay in processing this complaint, made some additional information requests to the Medical Council of New Zealand (MCNZ).

So the complainant was not surprised to read Ombudsman Donnelly’s comments in relation to the two letters the complainant had initially requested from the HDC (one from the Deputy HDC to the MCNZ, dated 29 Jan. 2015, and one from the MCNZ to the HDC, dated 4 June 2015). Mr Donnelly wrote: “*You have now been provided with redacted copies of both letters by the Medical Council of New Zealand (MCNZ) pursuant to the Privacy Act.*”

He then wrote further: “*My investigation and review under the OIA concerns the redacted sections of the letters that comprise official information, rather than personal information about you.*” Mr Donnelly mentioned that he had received a report with their concerns from the HDC and that he had also consulted with the PC, as he was ‘*required to do*’ under section 29B of the OIA.

The Ombudsman gave a brief '*Background*' of the complaint, acknowledging that the MCNZ had in the meanwhile provided the complainant with redacted copies of both letters, which the HDC had withheld pursuant to section 9(2)(a) OIA.

Under '*My investigation*' he wrote how he had reviewed the un-redacted copies of the particular letters in question. Again, he stated that he could not refer to the contents of the letters, but he accepted that: "*withholding of the official information in the letters is necessary to protect the privacy of natural persons*". Having considered the section 9(2)(a) provision of the OIA, he did not consider there was any countervailing public interest in the release of the letters that would outweigh the privacy interests supporting the withholding of the information.

He also wrote that the complainant would be aware from the redacted copy of the letter dated 4 June 2015, which he received from the MCNZ, that "*it decided to take no further action in response to the concerns raised*". The Ombudsman was of the view that "*accordingly no issue of public safety arises*".

So he presented his '*provisional opinion*', that the "*HDC was entitled to withhold the official information about other persons contained in the letters at issue*". The complainant was invited to comment by 21 Sept. 2017..

The Ombudsman's second provisional opinion in the form of a partly redacted copy of his letter dated 8 Sept. 2017 can be found via this link:  
<https://nzsocijaljusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-refusal-provisional-opinion-08-09-17.pdf>

## **PART 17 – THE COMPLAINANT'S SUBMISSIONS AND EVIDENCE IN RESPONSE TO THE SECOND PROVISIONAL OPINION**

The complainant responded soon to the invitation to provide some further comments on the complaint matter. With an email of 19.07h on Monday 11 Sept. 2017 he sent the Office of Ombudsmen a letter of the same date, outlining his remaining concerns on this matter.

In his letter the complainant wrote that it was correct that he had - since the complaint was filed (09 March and 12 April 2016) – received redacted copies of the letters dated 29 Jan. 2015 and 04 June 2015 from the MCNZ. He explained how he saw a need to take separate actions by requesting personal information from the MCNZ under the PA, while the complaint processing at the Ombudsmen's Office took so long.

He wrote that the MCNZ was a bit more forthcoming than the HDC had been. The complainant wrote that he was initially not aware that his complaint information was sent to the MCNZ on 29 Jan. 2015 together with information about other complainants. Also had he believed that '*other information*' the MCNZ later withheld or refused, was actually such other personal information about him. Hence he never expected the release of personal information belonging to other persons, he wrote, except about the doctor, whose name and some other complaint relevant details he already knew.

The complainant noted how the Ombudsman had differentiated between information requested to be released under the OIA and the PA. He reminded the Ombudsman that his

information requests to the HDC had been made pursuant to both the Acts. In paragraph [8] of his letter he explained how the HDC should in any case have seen a need to provide him with his personal information, which could have been done by presenting the letters in redacted form. He wrote that the Senior Legal Advisor at the HDC Office did not do that, withheld his personal information, and was therefore in breach of Principle 6 PA, providing no convincing reason that may have been available under Part 4 of the PA.

Then he wrote also, that given the Ombudsman had decided re the other aspect under complaint 42xx2x (the phone log), to refer that matter to the OPC, he presumed the same would have happened with this aspect of the complaint. As that was not the case, he would have thought, that the Ombudsman had at least acknowledged that the HDC should have taken action pursuant to section 6 and Principle 6 in the PA, and provided him with redacted copies of the two letters in question in the first instance.

As there were also other issues with actions and inactions by the HDC in relation to the information referral to the MCNZ under their MoU, including incorrect, misleading information having been referred without notifying him as complainant, the complainant expressed his hope that those matters may soon be resolved under complaint 43xxxx. He also mentioned yet another complaint he had made about the actions and a decision by the PC, under yet another complaint reference 44xxx4.

So the complainant did in the end accept the Ombudsman's provisional opinion that part of the information could correctly be withheld by the HDC under section 9(2)(a) of the OIA.

But he wrote that he would at the same time appreciate the Ombudsman's decision on whether the HDC acted appropriately or inappropriately when withholding the whole letters from him as requester, as redacted copies would not at all have unreasonably interfered with the privacy interests of any other persons. On this aspect he invited the Ombudsman's opinion, after having discussed relevant details with the OPC. Alternatively the Ombudsman could invite the PC to make a decision on this, he wrote.

The authentic text of the complainant's partly redacted letter to the Ombudsman, dated 11 Sept. 2017, can be found via this link:

<https://nzsocialjusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-prov-opinion-complnt-reply-11-09-17.pdf>

The Investigator assisting in this case wrote briefly to the complainant at 07.27h on 12 Sept., confirming receipt of the email and letter. She wrote that the Ombudsman would write again once the comments had been considered. But at 12.37h on that same day, she wrote again, asking for a copy of the complaint of 4 August 2017, to which the complainant had referred in his new letter, and re which he had not received a response yet.

The complainant wrote back at 13.41h on 12 Sept. 2017, informing her about some details re that correspondence, and on-forwarding the earlier email (1 of 4 sent) with attachments.

The Investigator wrote back at 13.48h, thanking the complainant for the email, and promising she would follow the matter up and get in touch again. At 14.40h she informed the complainant that the address, to which the email/s had been sent to by the complainant, had not been used by the Ombudsmen for some time. So she informed him of their now used email address [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz). The other complaint emails would later be found, and as it is covering another matter, it will not be of more relevance here.

## **PART 18 - THE OMBUDSMAN'S SECOND FINAL OPINION OF 21 SEPT. 2017**

On Thursday, 21 September 2017, at 08.08h, the complainant received an email from an unnamed sender at the Office of Ombudsmen, which had the final opinion letter of Leo Donnelly as Ombudsman attached.

Referring to the letter by the complainant dated 11 September 2017, he wrote that he now had an opportunity to consider his comments. Mr Donnelly acknowledged that the complainant had accepted his provisional opinion that the HDC was entitled to withhold the 'official' information about persons other than himself in the letters dated 29 Jan. 2015 and 4 June 2015, under section 9(2)(a) OIA. So the Ombudsman did then confirm that it was his final opinion that the HDC was entitled to refuse his request on that basis.

Answering to the sought opinion as to whether the HDC was entitled to withhold the complainant's **personal** information in the letters, the Ombudsman did again shy away from taking a clearer and more convincing position, by writing that "*an Ombudsman does not have jurisdiction to consider complaints about interference with privacy, including refusals to release personal information*". He referred to section 17A Ombudsmen Act 1975, and wrote that its provisions allowed for the referral of a matter to the Privacy Commissioner.

And then he wrote the following astonishing comment:

*"However, in circumstances where you have been provided with the personal information at issue, first in summary by HDC and later in full by MCNZ, and where you have already pursued matters directly with the Privacy Commissioner, no question of referral under section 17A arises. I have concluded my investigation and advised HDC accordingly."*

So Ombudsman Donnelly acted extremely carefully in forming a view and expressing his opinion in this complaint matter, basically dissecting a complaint into various aspects, and dealing with each one accordingly, also being extremely mindful of legal implications.

He let the HDC off in all aspects of the complaint, even though a reasonable person would have thought, where a complaint that combined PA and OIA aspects at the same time, the Ombudsman would simply have sought advice from the Privacy Commissioner, and then formed and communicated his own opinion on the whole matter.

It appears also, that in order to get rid of a backlog of complaints, the Ombudsman is rather keen to refer complainants – or parts thereof - to other Offices, and to ask for having their complaints being dealt with by them, when they may not strictly and fully fall within the already somewhat unclear 'jurisdiction' of the Ombudsmen. We will comment further on this in the last '**PART 19**' in this report and 'post'.

Here is an authentic scan copy with the partly redacted, anonymised final opinion letter from Ombudsman Leo Donnelly, dated 21 Sept. 2017, found via this link:

<https://nzsocijusticeblog2013.files.wordpress.com/2017/11/ombudsman-complaint-42xx2x-hdc-oia-pa-rqsts-fin-opinion-dec-anon-21-09-17.pdf>

## **PART 19 - CONCLUSION: ONE RULE FOR THE HDC, ANOTHER FOR THE PC AND MCNZ, AND LITTLE 'RESOLUTION' AND 'FAIRNESS' FOR A COMPLAINANT**

Upon reading, analysing and assessing the above correspondence and information, and considering what actions were taken by the Ombudsmen Office; one can make some fair presumptions about the commitment of the Ombudsmen to investigate such matters brought to their attention by an ordinary complainant about the HDC. It is in our view not such a good look, how the complaints were handled and decided on. There appears to be a worrisome tendency by the Ombudsmen, our top 'watch-dogs', to be somewhat 'risk averse' and to shy away from investigating other Officers of Parliament, such as the HDC and also the OPC.

The complainant was obviously very disappointed about the decision by the Ombudsman to firstly support the HDC in their decision to withhold that letter dated 16 August 2010 under section 9(2)(a) of the OIA. A previously complained about WINZ commissioned Designated Doctor had referred to that letter, when writing to the HDC on 20 Sept. 2012, trying to defend his actions. That doctor, a general practitioner, was apparently rather firmly of the view, that the particular letter contained information that the HDC would rely on, to not investigate him for his conduct during an examination and assessment of a referred WINZ client. He considered that *'all complaints of this nature'* were *'more correctly addressed to the Medical Appeals Board'*. Also did the decision letters from the Deputy and Associate HDC (dated 24 April, 17 Sept. and 22 Nov. 2013) re complaint matter C12HDCxxxxx contain similar clear references (although made incorrectly) to WINZ and their Medical Appeals Board, supposedly being the more appropriate agencies to address the complainant's 'concerns'.

As the Ombudsman did with his letter of 29 June 2017 uphold the decision by the HDC, also rejecting that there was countervailing public interest to release the letter, we will most likely never know, what that letter actually contained, who wrote it and to whom it may have been addressed. It did not lessen the complainant's distrust towards the HDC, whom he appears to suspect of having collaborated with MSD and WINZ to some degree in the past. It is somewhat hard to believe, that the letter could not be made available at all, at least in redacted form, and due to the Ombudsman's decision it cannot be ruled out, that such a person like MSD's Principal Health Advisor Dr Bratt may actually have been mentioned in that letter.

While that first 'opinion' or decision by Ombudsman Leo Donnelly was a disappointment to the complainant, the other opinions by the Ombudsman were even more so. In some ways they can only be described as bizarre views, at least representing efforts to split hairs, so to say, by differentiating so clearly between matters that according to the Ombudsman's opinion should fall under the Privacy Act, and those that should be dealt with under the OIA. This was done, although the complainant had requested information under both the OIA and PA.

Referring the phone log *'personal information'* matter to the OPC did actually appear as if the Ombudsman did simply not wish to deal with the related reported issues, perhaps because the complainant raised serious concerns about alleged professional misconduct of an HDC Assessor, who first recorded that log on 9 August 2011. Mr Donnelly may also have chosen not to question explanations provided by the Associate HDC, Dr Elkin (on 19 Feb. 2016), even though they did not seem to add up, that is in relation to the 'editing' of that log, and its later shifting from a long closed file from 2007, where it was allegedly put by mistake, to the 'correct' file. There appears to have been no convincing reason for that log not to have been

available for the information response by the HDC of 23 March 2012, weeks after it was allegedly 'moved' to the 'correct' file on 6 March or in 'early March' in 2012!

The Ombudsman, and their Auckland Office Manager for Investigations and Resolution, appeared to be only too keen to refer that matter to the Privacy Commissioner. The reason given was that the phone log contained '*personal information*', and complaints about the refusal of such, or inaccuracies in it, would fall under the PA (see their correspondence of 30 May and 7 July 2017). It was repeatedly asserted that the Ombudsmen have '*no jurisdiction*' to consider such complaints. Re accuracies and '*storage*' issues of public records containing the complainant's personal information, the complainant was also repeatedly advised to present his concerns to the Chief Archivist.

Looking at section 17A of the Ombudsmen Act 1975 and section 29B OIA, those provisions do merely state, that the Ombudsman shall, upon '*consideration*', or '*before forming a final opinion*', on complaints before him, **consult** with the Privacy Commissioner, in order to determine the appropriate way of dealing with them. Most certainly, according to section 17A Ombudsmen Act, it is the Ombudsman who shall determine how to deal and proceed with them. Section 21A contains further details on how the Ombudsmen may consult with the PC. The OIA provision only expects the Ombudsman to seek the Privacy Commissioner's advice on whether personal information may be refused under the OIA section 9(2)(a) or not.

There is no mention of the Ombudsmen having '*no jurisdiction*' whatsoever - or that any complaint aspects involving personal information would fall totally outside of the authority or scope of the Ombudsmen. Yet the Ombudsman made comments about the '*scope of the investigation*', meaning it would not cover certain aspects of the complaint presented by the complainant. There is certainly no provision in the Ombudsmen Act that stipulates that complaints must be referred to the Chief Archivist. And where other serious issues are raised, even as additional concerns, mentioned as part of a complaint, the Ombudsmen always have the ability to launch an investigation of their own motion (s 13(3)), which rarely happens.

One would think, that where a complaint contains a number of aspects, where '*personal information*' is just one of them, and where other important issues are raised about decisions or actions by organisations, departments or agencies covered by the Schedule 1 of the Ombudsmen Act, then it could and should still be dealt with by an Ombudsman. But from the considerations, formed opinions and decisions that were made, there appears to have been a great reluctance to firmly and properly address certain aspects at all.

Most bizarre was the Ombudsman's opinion - or decision - to back the HDC in their decision to withhold the letters by the Deputy HDC to the MCNZ, dated 29 Jan. 2015, and the MCNZ's response dated 4 June 2015, pursuant to section 9(2)(a) OIA. The fact that the MCNZ had released redacted copies of that same correspondence (received from the Deputy HDC) to the complainant under the PA, and had seen no problem in doing so, while the HDC refused to make the letter dated 29 Jan. 2015 available full stop, must have put the Ombudsman into a difficult spot. That would have been even more so, given the Privacy Commissioner's later advice to the MCNZ, to release to the complainant also a redacted copy of the MCNZ response to the HDC of 4 June 2015.

Instead of admitting that the HDC could have done the same from the very outset, that was not what the Ombudsman considered. It must be noted, that the complainant asked for that information under both the OIA and the PA. The Ombudsman rather used technical legal explanations to say the HDC was '*entitled*' to refuse the same letters from the start under the

OIA, upon repeated requests by the complainant. The final opinion by Mr Donnelly, dated 21 Sept. 2017, reads like an effort to split hairs, rather than presenting a more common sense explanation and view. He again makes it a '*jurisdiction*' matter, why there was no need for him to consider '*complaints about interference with privacy, including refusals to release personal information*'. Referring to section 17A Ombudsmen Act, mentioning the possible referral of complaints to the Privacy Commissioner, and noting that the complainant had already obtained the same letters through other channels under the PA, he simply writes '*no question of referral under section 17A arises*'. Therefore the Ombudsman's provisional opinion letter of 8 Sept. 2017 and final opinion letter of 21 Sept. 2017 are smart efforts of effectively providing some legal protection for the HDC, which is of course in our view. The same can to some degree be said about the referral of the phone log matter to the OPC, and about the forming of the opinion, that the letter dated 16 Aug. 2010 could be withheld.

Our observation is that the Ombudsman, certainly in this case, like in a few others, appears very reluctant to step onto the toes of any other 'watch-dog', such as the Health and Disability Commissioner, the Privacy Commissioner, and probably a few others.

While this appears to be so, we must admit, that this is all still 'legal', as the Ombudsman has of course the ability and discretion to interpret and apply the law as it stands. Whether it involves the dissection of complaint matters, the splitting apart of such into various complaint aspects, and then dealing with them separately, one by one, under available statutes, also using available discretion, this is not against the law. But for those who have some insight into this, and gathered experience in dealing with our various watch-dogs, it raises more questions than it provides answers. It certainly does not provide a complainant with what we would consider as being a fair and acceptable resolution. Again, the catch-call '*fairness for all*', used by the Ombudsmen, rings somewhat hollow in the ears of some complainants. We can only invite you as readers to form your own opinion on the information presented here, which is absolutely authentic and can easily be backed up with the available original documents, should there ever be a serious challenge put to us.

Last not least we ask: **With 'watch-dogs' like these, who needs them?**

Post updated and finalised – **28 Nov. 2017**

## **Quest for Justice**

Link to online version of this post - on the website 'nzsocialjusticeblog2013':  
<https://nzsocialjusticeblog2013.wordpress.com/2017/11/21/how-the-new-zealand-ombudsman-effectively-provides-cover-for-the-hdc-an-information-request-complaint-case/>