Re: Complaint 42xx2x, under the Ombudsmen Act 1975, and request for a review under Part 5 of the Official Information Act 1982, regarding the Health and Disability Commissioner’s decision to withhold a letter dated 18 Aug. 2010 that is of public interest

Dear Ombudsman Mr Donnelly, dear staff at the Office of Ombudsmen

[1] Thank you for your letter dated 9 June 2017, which is a response by your Office, providing a provisional opinion on a part of my complaint, filed under your reference 42xx2x, which I originally made by way of a letter dated 9 March 2016. In that complaint I raised my serious concerns about the Health and Disability Commissioner (HDC) refusing to make available a copy of a letter dated 16 August 2016, which I had requested (besides of other documents) under the Official Information Act 1982 (OIA), and where applicable also the Privacy Act 1993 (PA), on 19 October 2015 (see ‘B.’). I may point out that some of the then asked for information had never been made available upon some earlier OIA and PA requests that I had made. While the HDC withheld that particular letter of 16 August 2010 under section 9(2)(a) of the OIA, as explained in Principal Legal Advisor Hxxxx Dxxxxxx’s letter dated 17 Nov. 2015, I again asked for the release of that information by way of letters dated 24 Nov. 2015 and 15 Feb. 2016. I stressed, that the letter, referred to by Dr Dxxxx Xxxxxxx in his letter dated 20 Sept. 2012, seemed relevant to the HDC when deciding on my complaint made under their reference C12HDCxxxxx. I stated that my personal interest, and also the public’s interest, in the release of that letter, would outweigh the stated privacy concerns of other individuals. At the same time I indicated that I would be satisfied with a redacted copy of the same letter.

[2] In a letter dated 19 Feb. 2016, Associate Commissioner Katie Elkin, also responsible for Legal and Strategic Relations, upheld the HDC Office’s decision to withhold the mentioned letter. Besides of the already stated section 9(2)(a) OIA concerns, she added, that “the additional information contained in this document is such that the privacy interests of other individuals cannot be addressed as you suggest.” Ms Elkin did apart from that refer to the earlier comments in Ms Dxxxxxx’s previous letter from 17 Nov. 2015. As I was very dissatisfied with this, and the HDC’s responses to some other requests, and while I was not convinced that the reasons given by the HDC Office had sufficient validity and relevance in this case, I consequently filed my complaint with the Office of Ombudsmen on 9 March last year.

[3] In my complaint, and in the relevant evidence that I presented with PDF attachments in addition to my letter from 9 March 2016, I have already explained in some detail my considerations and my views on this matter. I will not retract from the concerns and arguments that I presented 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 this letter I will present some of my remaining, plus additional concerns, and restate the interests that I and the wider
public should have, in regards to the withheld letter dated 16 August 2010. Of importance to note remains to be the fact, that this letter was apparently of some relevance to the HDC when considering a decision on my complaint C12HDCxxxxx, and therefore the HDC should feel compelled to provide the transparency that must be expected, to explain the handling and decision making on that complaint matter. The reasons given by the HDC Office, for not seeing a need to investigate my complaint against Dr Hxxxxxx, appear to resemble the same considerations that Dr Hxxxxxx must have made, while referring to the letter of 16 August 2010. From other information I have, I must also draw the conclusion that other agencies and/or their representatives may have had a role to play in this matter, and this would warrant the release of the letter for public accountability and transparency reasons.

Your provisional opinion

[4] Under ‘Analysis’ in your letter dated 9 June 2017 I read the following:
“I confirm I have reviewed an unredacted copy of the 16 August 2010 letter. I have also consulted with the Privacy Commissioner as I am required to do under section 29A of the OIA. I accept that withholding of the letter is necessary to protect the privacy of natural persons and that section 9(2)(a) of the OIA therefore applies. I am not able to refer to the contents of the letter in any detail when providing you with reasons for my provisional opinion as that would infringe the very privacy interest I consider requires protection.”

[5] “Pursuant to section 9(1) of the OIA I have considered whether there is a countervailing public interest in release of the letter. I accept there is a public interest in transparency of HDC’s decision making in relation to your complaint about Dr Hxxxxxx. In his letter of response to your complaint dated 20 September 2012, Dr Hxxxxxx referred to the consideration of complaints against non-treating doctors by the Medical Appeals Board, as opposed to HDC, and stated ‘I attach a letter dated 16 August 2010 from your department which outlines such a policy previously.’”

[6] “However, as you have been previously advised by HDC, its letter of 16 August 2010 did not set out a statement of HDC policy but rather contained a comment in relation to another matter that states ‘[The] Medical Appeals Board (MAB) is best placed to consider these concerns.’ I confirm that HDC’s advice to you in this respect is correct. Whether, and for what reason, Dr Hxxxxxx may have interpreted HDC’s comment on a specific matter as a statement of HDC policy is not a matter on which I am able to comment.”

[7] “In my view, 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 letter of response to your complaint. There is no overriding public interest in you being provided with the remainder of the letter.”

[8] “I have considered your suggestion that you be provided with a copy of the letter with all personal details redacted. However, having reviewed the letter I am of the view that the contents are such that it is necessary to withhold the entire letter, other than the excerpt already released to you by HDC, in order to protect the privacy of natural persons.”

[9] “As noted above, I have reached a view that section 9(2)(a) applies to the letter. There is no countervailing public interest in release that outweighs the privacy interest supporting withholding under section 9(2)(a). Accordingly I consider that HDC had good reason to withhold the letter.”

HDC’s attempted rebuttal regarding the relevance of their letter dated 16 August 2010

[10] In her letter dated 17 Nov. 2015 Ms Dxxxxxx, Principal Legal Advisor for the HDC wrote: “I have not included the letter dated 16 August 2010, referred to in Dr Hxxxxxx’s 20 September 2012 letter to this Office, as it relates to a matter involving other individuals. Accordingly I am withholding that letter pursuant to section 9(2)(a) of the Official Information Act to protect the privacy of those individuals. The “policy” that Dr Hxxxxxx refers to as being outlined in the 16 August 2010 letter is not, in fact, a statement of HDC policy, but a comment made in relation
to another matter that states: “[T]he Medical Appeals Board (MAB) is best placed to consider these concerns.”

[11] In her letter dated 19 Feb. 2016, Associate Commissioner Katie Elkin wrote in addition to the above (at the top of page 2):

“The additional information contained in this document is such that the privacy interests of other individuals cannot be addressed in the way you suggest.”

My presumptions as to references made in the letter of 16 August 2010 by the HDC, possibly by Mr Anthony Hill as newly appointed Commissioner, or one of his colleagues

[12] From your letter with your provisional opinion, dated 9 June 2017, and from comments and references made in earlier correspondence received from the HDC in this matter, I can only come to the following conclusion: The letter by the HDC may mention a person - or persons - who hold a high public, or similarly important office, who acted in such capacity, and who made comments, possibly in consultation with the HDC himself, in relation to HDC complaints made about third party examiners or assessors. Clearly references were made to the ‘Medical Appeals Board’ and how some matters should rather be dealt with by persons sitting on these. The letter’s author and/or other mentioned person(s) insist on their privacy interests being maintained, as the revealing of their details in context of the letter may, in their view, compromise or challenge their ability to perform duties they have been commissioned with.

[13] It is in my view no coincidence that this particular letter dated 16 Aug. 2010 was referred to in a letter by Axxxxxxx based general practitioner Dr Dxxxxx Hxxxxxx, dated 20 Sept. 2012, as a first response to the HDC’s notification to him, of my complaint made against him. It appears somewhat clear from his words, that Dr Hxxxxxx, a Work and Income (WINZ) appointed ‘Designated Doctor’, was of the view, that ANY such complaints against a supposedly non-treating third party examiner or assessor, should rather be referred directly to a Medical Appeals Board appointed by the Ministry of Social Development (MSD), or their department Work and Income (WINZ). That appears to generally have been the usual way of dealing with complaints against Designated Doctors performing examinations for Work and Income.

[14] Even if the letter by the HDC, dated 16 August 2010, may have been intended to address a more particular, somewhat separate aspect of such complaints (e.g. contents of assessors’ reports), and even if Dr Hxxxxxx may have misinterpreted the meaning or scope of it, there is sufficient indication that Dr Hxxxxxx was used to a different approach being taken, than the perhaps more differentiated or nuanced approach, that the HDC now asserts he would take.

[15] I understand also, that there have not only been consultations between the HDC and the Medical Council of New Zealand (MCNZ) about how such complaints against third party assessors or examiners should be treated and dealt with, but also with MSD or WINZ. It is of particular concern to me, that transparency is provided on this, as the wider public is provided with very little, and possibly rather misleading information. So far I am aware of this source: https://www.mcnz.org.nz/assets/News-and-Publications/Statements/Non-treating-doctors.pdf

[16] My concerns have not been lessened with recent responses that the HDC provided on referrals and notifications of complaints to the MCNZ, which I understand will be assessed and investigated separately by your Office of Ombudsmen (see ref. 45xxxx8). These concerns have existed for some years now, and were certainly increased through my experiences with the HDC Office’s handling of my complaint to them under reference C12HDCxxxx. While I made a complaint based on breaches of the rights contained in the ‘Code of Health and Disability Services Consumers’ Rights’ (the Code), the complaint was not investigated for the very peculiar and even untrue reasons, that concerns I raised with it were better dealt with by Work and Income, while I had supposedly already been “successful” with an appeal to a Medical Appeals Board. As I have already stated repeatedly in other complaints to your Office, same as to the HDC and Privacy Commissioner’s Office, I NEVER succeeded with such an appeal, and also were the concerns I raised under the Code, clearly related to the actions of Dr Hxxxxxx as the medical examiner. Certain reports and other information were merely presented as evidence I considered relevant for the HDC to review his questionable conduct.
When the HDC makes such bizarre, unreasonable, baseless and questionable decisions, and then withholds a letter dated 16 August 2010, which according to Dr Hxxxxxx’s letter from 20 Sept. 2012 showed what he understood to be a kind of “policy” by the HDC, then the HDC should not be surprised that I do not trust their actions and comments in these matters.

MSD’s collaboration with the HDC

My concerns have also not been lessened for the following reason. The Principal Health Advisor for MSD or WINZ, Dr David Bratt, whose name I suspect may even be mentioned in that letter dated 16 Aug. 2010, has repeatedly revealed information in some of his presentations, that indicates what he considers to be the ‘appropriate’ way of dealing with complaints, such as the one I made to the HDC under their reference C12HDCxxxxx.

I can quote from just one presentation he has used for “training” Designated Doctors, who he is in charge of providing training to, and with whom he is also working and consulting on a regular basis, at least indirectly through interactions that his subordinate Regional Health Advisors and Regional Disability Advisors at WINZ Offices throughout the country have with them. In a presentation titled ‘Designated Doctor Training Session’, that does on the front slide mention the year ‘2010’, but which appears to have been updated and added to - for use in consecutive years (here for a ‘GP CME 2014’ conference), he says the following on slide 23:

“Review Rights”
- Any complaints by clients about your report should be referred to Work & Income
  - Do not see the clients again
- It is Work & Income’s responsibility to deal with any issues the client has had with their DD appointment and report
  - If you ever get a complaint channelled through the Health and Disability Commissioner’s office let me know asap."

The presentation can be found via the internet by clicking this link, or by putting it into a search box of a search provider:
I will endeavour to also attach a downloaded PDF with it to the email(s) carrying this letter.

Also, reading the information on slide 16, titled ‘The Assessment – Diagnosis’, raises questions as to what Dr Bratt actually means with his comments. The Social Security Act 1964 (SSA) clearly talks about ‘examinations’, which is an exercise performed by a medical or other authorised and agreed health professional, to also make findings that are or resemble a ‘diagnosis’. What else would they be involved in? But Dr Bratt claims they are “not” supposed to make a “diagnosis” on a person’s condition! As a matter of fact, Designated Doctors are also used by WINZ, when a client may not have an own doctor, or when there are uncertainties about reports from his/her own doctor, and specialists. If a Designated Doctor is not meant to decide on a diagnosis, then what is the purpose of having him (or her) involved?
Dr Bratt’s comments also seem to contradict what is printed in a ‘Guide for Designated Doctors’\(^6\), which I also obtained through discovery with the help of my legal Counsel in January 2012, a Guide printed about April 2011, which also appears to have been the one in use in 2010. It says on page 3 (5 in the PDF) under ‘Introduction’\(^a\): “Work and Income have established a panel of designated doctors; respected medical practitioners who provide second opinions on medical information.” Under ‘Role of designated doctors’ it also says the following: “Your role as designated doctor is to provide an independent medical opinion to Work and Income.” But while the role is further explained, the words “assess” and “assessment” are being used, rather than “examine” or “examination”, which is actually what the Social Security Act says. On page 9 (11 in the PDF) it clarifies though, that referrals to such ‘Designated Doctors’ are made when for instance “the diagnosis is unclear”, or “the person is unable to provide existing reports and/or a medical certificate”, which indicates, that such a practitioner may after all be expected to provide these services.

Upon reading such comments, in such ‘presentations’ by Dr Bratt, the impression is somewhat clear, of what is going on. I must presume also in collaboration and coordination with the HDC himself. Dr Bratt makes clear mention of the HDC, and that practitioners should let him know “asap”, when they get “channelled” a complaint through the HDC. So he must have consulted with the HDC on such matters, as others at the MSD may also have done. This would to some readers appear to indicate nothing short of collusion, by making concerted efforts to keep complainants from making potentially justified, valid complaints against such Designated Doctors, or for that sake also ACC examiners or assessors, under the Code the HDC is supposed to uphold and administer as part of his functions.

There is also other evidence of Dr Bratt and MSD having attempted to influence doctors and other parties, and I point you to a report that was published by Gordon Purdie, Senior Research Fellow at the University of Otago based in Wellington, as a ‘Viewpoint’ in the New Zealand Medical Journal (NZMJ) on 20 Nov. 2015\(^7\). It relates to false ‘evidence’ being presented by Dr Bratt as Principal Health Advisor for WINZ, which was based on the incorrect interpretation of return to work reports, which he clearly misrepresented in an attempt to influence medical professionals. Dr Bratt has used misleading information and poorly researched information in many of his presentations to general practitioners and other professional assemblies, and thus misled them.

Dr Purdie wrote the following in the NZMJ’:\(^8\)

“When I read the statements I thought them unlikely to be true, so I looked for their source, the position statement, and checked the referenced study,” which shows them to be without foundation. Presumably the authors and repeaters have found them believable, for example Dr David Bratt, Principal Health Advisor, Ministry of Social Development, New Zealand, said at the Welfare Working Group Forum, that the figures come from Australia, but that he knows that figures would show exactly the same thing happens here.\(^9\) The statements have been presented in non-injury contexts, for example being out of work\(^10\) or mental illness.\(^11\)

“The statements are being used to support statements like: “Urgent action is required if a person is not back at work within a matter of weeks. If a person is not back at work within three weeks urgent attention is needed”\(^11\) even though the data is for time after an initial 10 days off work.”

“The incorrect statements about the chance of ever getting back to work are being presented to general practitioners (GPs) continuing medical education conferences in the context certifying people as unfit for work, together with statements like the ‘benefit’ is “an addictive debilitating drug with significant adverse effects to both the patient and their family (whānau)”.\(^10\) They are being presented to GPs in the context of assisting patients to safely stay at work or return to work early.\(^4\) These appear to be encouraging GPs to assess injured and unwell patients as having capacity for work and not issuing medical certificates for work incapacity. This could result in the cessation of welfare benefits or injury compensation. When these patients lack the capacity to work, they could experience increased financial hardship. For example, people might move from injury compensation to an unemployment benefit, and those without benefit entitlements to no income. There are also consequential beneficiaries of these income shifts. For example, reductions in government
expenditure have been associated with reductions in taxation. Reductions in injury compensation for work-related injuries could result in reductions of employer levies/ premiums for workers’ compensation and consequential increases in dividends to the owners of businesses.”

The Australasian Faculty of Occupational and Environmental Medicine did later confirm that the mistakes occurred, and their apologetic response, also published via the NZJM, on 19 Feb. 2016, can be found via this hyperlink: https://www.nzma.org.nz/journal/read-the-journal/all-issues/2010-2019/2016/vol-129-no-1430-19-february-2016/6822

[31] So this shows without any doubt, that Dr Bratt is somewhat convenient with the practices he follows as Principal Health Advisor for WINZ and MSD, and he is also somewhat convenient with the truth, when presenting information. His comments made in his presentation on ‘Designated Doctor Training’ must be of serious concern, as they suggest he is trying to stop affected WINZ clients from approaching the HDC for the purpose of making complaints against Designated Doctors, he is most certainly telling his contracted and even other doctors, to contact him, I presume to “sort out” such complaints, possibly with the HDC, so they do not go any further than to MSD, and thus stay in-house.

[32] In mentioning all this, I trust you will in the near future also apply greater scrutiny towards what the HDC and MCNZ are doing, in relation to their ‘notification’ and information ‘referral’ practices under the joint Memorandum of Understanding (MoU), and under the Health and Disability Commissioner Act 1994 and the Health Practitioners Competence Assurance Act 2003. That is of course in relation to other complaints before your Office (ref. 43xxxx and with at least some indirect relevance to 44xxx4), which I will not further discuss with this letter.

[33] But returning to the matters raised with my complaint under 42xx2x, I wish to mention the following: Further to the assertions made by the HDC (see Theo Baker’s ‘decision’ under ‘My consideration’ dated 24 April 2013⁴), and apparently supported by Dr Hxxxxxx in his letter dated 20 Sept. 2012⁵, that such concerns as I had raised with my complaint against Dr Hxxxxxx were best dealt with by the ‘Medical Appeals Board’ of WINZ (or MSD), this is again complete nonsense, as such a Board has NO jurisdiction over the conduct of the medical professional who conducted the examination under the Social Security Act 1964!

[34] I point to the ‘Medical Appeals Board - A resource for Board Members’⁶ publication by MSD, that was made available to me through discovery, requested by my legal representative Fxxxxxx Jxxxxxxx in January 2012. It is the document that was relevant and in use by MAB members when I had my appeal heard in late October 2010, which was in the end not upheld.

[35] On page 19 it says about the ‘jurisdiction’ of such a Board⁶:  
“Outside jurisdiction of medical appeals board”  
“The Board may hear an appeal only when a decision has been made, based on medical grounds or on grounds relating to a person’s capacity for work, to decline or cancel the following types of financial assistance:  
• Child Disability Allowance  
• Invalid’s Benefit or  
• Sickness Benefit.  
The Board may not hear an appeal outside of these areas.”

[36] Another legally based summary of the role and jurisdiction of such a Board is also given on page 14. I will provide your Office (once again) with a PDF containing this authentic document, for your own inspection (see attachment 5). It is clear that such a Board has NO responsibility or jurisdiction to examine or review an examiner’s or assessor’s conduct, and thus both Dr Hxxxxxx and the HDC Office were wrong in asserting this was an alternative or even “appropriate” way of dealing with the concerns in my complaint about Dr Hxxxxxx.
My concerns about your Office supporting the HDC in withholding the letter of 16 Aug. 2010

[37] It is with great concern, that I read your comments in response to my complaint to your Office, and in relation to the letter dated 16 August 2010, which the HDC appears to have sent to Dr Hxxxxxx, and possibly other parties, to inform him of their position on a matter relating to complaints made. While you understandably have not released any further details about the contents of that letter, I remain unconvinced that it is not in the interest of the wider public, or that public interest is outweighed by privacy interests of individuals mentioned or even indirectly referred to in the same document.

[38] Given the above information, about MSD and Dr Bratt, and about the HDC and Dr Hxxxxxx holding positions that cannot be supported by law, and that are not factual, I remain very seriously concerned that the contents or subject matter of the particular letter in question contains information that was still considered relevant by the HDC when forming a decision on my complaint under reference C12HDCxxxx. You comment yourself on page 2 of your letter dated 9 June 2017: "I accept there is a public interest in transparency of HDC’s decision making in relation to your complaint about Dr Hxxxxxx.” While I acknowledge, that the subject matter mentioned in the letter of 16 Aug. 2010 may not represent a “policy” by the HDC, it nevertheless refers to the consideration of complaints about non-treating doctors, and also mentions the ‘Medical Appeals Board’. I consider that it thus is of wider public interest, even if it may not directly relate to the type of complaint I filed with the HDC under the Code.

[39] In order to get a better understanding and appreciation of the HDC’s complaints handling practices and the guidelines their Office follows, it should for that reason alone be fair and reasonable to release the letter of 16 August 2010 in the requested redacted form. I consider also, that any privacy concerns should be overridden, as the author and any official or other person referred to in that letter, except of course a complainant him-/herself, should be held accountable for any comments they make on such very serious matters as the complaints handling by the HDC. Not only have I suffered immensely as a consequence of a so-called Designated Doctor treating me wrongly and inappropriately while conducting an examination for WINZ on me under the SSA, and also due to the HDC refusing to act on my justified and valid complaint against such a doctor, I have heard of other cases, where people were misdiagnosed, some with mental health issues, that felt pressured and at risk of suicide.

[40] The decision by you as Ombudsman to back the HDC in withholding the letter will do nothing to lessen my mistrust and disagreement with the HDC and their staff, and it will also not reduce the perception among a growing number of affected persons in the wider public, who have a rather negative view of how the HDC and their Office treats complainants and persons who suffered misdiagnosis, medical malpractice and other wrongdoings or failures.

[41] I do even dare to suspect - or presume - that it is Dr David Bratt, who is being referred to in that letter of 16 August 2010, as his past actions have also given me no reason to put any faith in his actions and his integrity as Principal Health Advisor for a leading state agency, MSD.

[42] All I can ask is that you consider the concerns that I add with this letter to the ones I already expressed before, and to change your opinion, so to advise the HDC to make the document available with appropriate redactions of personal information of other individuals. It should not be permitted that persons acting in their important, high level professional capacity are allowed to hide behind privacy law when making potentially questionable statements or decisions on complaint handling processes or procedures. Such may negatively affect many complainants who may suffer similar experiences as I had. Participants who may act in nothing much short of collusion between agencies should not be allowed to hide behind the Privacy Act 1993.

[43] Your respected decision and response in this important matter will be appreciated. I look forward to you response in due time.

Yours thankfully and sincerely

Xxxxxxx Xxxxxx
Attachments (PDF files to be sent by email only):

1). ‘Ombudsman, complaint 42xx2x, HDC, OIA + PA info, ltr fr. 16.08.10 withheld, X. Xxxxxx, ltr, 13.06.2017.pdf’;
3). ‘H + D Commissioner, C12HDCXXXXX, complaint, Dr Hxxxxxx, flawed decision, dated 24.04.2013.pdf’;
4). ‘Dr Bratt, Fri_room6_1400 Bratt Designated Doctor Training, 2010.pdf’;
7). ‘NZMJ, G. Purdie, AFOEM, MSD use false info, Purdie-1874FINAL1425, 20.11.15.pdf’.