28 October 2017

Complaint 39xxx4 - about the Ministry of Social Development (MSD) refusing to provide certain information under the Official Information Act 1982 (OIA), upon my request of 1 Oct. 2014; your provisional opinion dated 24 Oct. 2017

Dear Ombudsman Mr Donnelly, dear Bxxxxx Xxxxxx

Thank you for your letter dated 24 Oct. 2017, with which you provide me with your provisional opinion on my complaint, relating to the unsatisfactory responses by the Ministry of Social Development (MSD) to my original OIA information request dated 1 Oct. 2014. The initial complaint, dated 13 Dec. 2014, was at first only treated as a ‘delay complaint’, but with my letter dated 9 March 2015 I pointed out a number of issues with MSD's information response of 26 Feb. 2015. I then wrote: “some very crucial, expected information that I had requested was again not supplied, without any explanations. Certain other information was withheld for various stated reasons, by referring to section 18 (e), (f) and (g) of the Official Information Act. Some of these refusals appear reasonable, but in at least one case I cannot and do not accept the stated reason.” I wrote to your Office and explained that I could not agree with your earlier consideration, that it was unnecessary to take further action in this matter. I also commented: “MSD has most certainly not delivered all the information I requested on 01/02 October 2014, and that I should reasonably have expected.”

Since then some further correspondence has followed in relation to this complaint, but as you mention correctly in your recent letter, there were significant delays in progressing this complaint (from 31 August 2015 onwards), due to internal processing resource issues, and due to some uncertainties regarding case allocations to investigators, e.g. whether this should be processed in Christchurch, Auckland or Wellington. Hence the matter could only recently be investigated, which has led to your provisional opinion that I received just a few days ago. In view of the significant delays, and considering the at times very difficult circumstances your Office has been in, I accept the apologies you have provided.

Senior Investigator Bxxxxx Xxxxxx informed me by way of a letter dated 16 May 2017, that only the refusals by MSD to provide information upon my original information requests 1, 2, 3, 4, 6, 7, 8 and 11 could be notified to MSD as requiring further responses. Some matters did apparently not fall under the jurisdiction of the OIA. In your provisional opinion you have provided your views on my complaints regarding those particular requests I made to MSD.
On page 5 of your recent letter you consider that issues discussed in respect of my information requests 2, 4 and 7 have upon further consultation been resolved by MSD’s agreement to provide further information to me, which you have already received from the Ministry. You have though invited my comments on your provisional opinion in respect of requests 1, 3, 6 and 11 (by 14 Nov. 2017), before you will form your final opinion.

In your letter you have also provided me with further comments and advice in relation to ‘Record keeping by Dr Bratt’, responding to additional information I had sent to your Office on 21 May and 25 Aug. 2016. I note that my letter of 21 May 2016 was sent for the attention of Professor Paterson and your Office, and a further email dated 25 August 2016 reminded you as Ombudsman of that earlier sent information, which I considered to also be of some relevance to complaints 36xxxx and 41xxxx. That was after former Ombudsman Paterson had decided not to investigate the deletion of the specified types and range of emails, by MSD’s Principal Health Advisor, Dr David Bratt (see also my letters to Prof. Paterson, dated 7 July 2015, 26 August 2015 and 18 April 2016, filed under ref. 36xxxx). I appreciate that the particular information you refer to was also considered with this complaint.

In my response to your provisional opinion I wish to make some further comments in relation to aspects of my complaint about MSD’s responses to my original information requests 1, 3, 6, 8 and 11, that is after having read your various considerations and formed opinion, and also in regards to your advice on Dr Bratt and his repeated misrepresentation of statistical and scientific reports, which includes his ‘record keeping’ on such matters.

I will deal with each of these complaint aspects and your corresponding provisional views request by request, or point by point. Firstly though, I wish to mention, that I have up to this day not received any further information from MSD in response to my information requests, which goes beyond of what the Ministry had initially made available on 26 Feb. 2015.

**Request 1 – your provisional opinion – my further comments**

Not wishing to repeat my original request, which is on record and known to you, I did definitely also ask MSD for the “on site service provider addresses, and the particular services offered”, besides of the other information I requested on 1 October 2014. Hence there is no doubt that on-site addresses of providers had been asked for.

You write in your letter with your provisional opinion, dated 24 October 2017: “In response to notification of this complaint the Ministry has noted it may not itself have been provided with all the sites’ addresses used by providers; the Ministry only contracts with one office, the provider may then have many sites.” “The Ministry noted that the providers have websites which contain physical addresses which are publicly available. You have been provided with the name of the providers by the Ministry.

You therefore formed the following expressed opinion: “In terms of the OIA, it is my provisional opinion that your request for this information can be refused under section 18(d) on the basis that it is publicly available, and section 18(g) where the Ministry does not actually hold the information.”

In response to this, I must firstly consider, given the fact that the Ministry did only provide me with tables in hard copy (or PDF file) documents (e.g. ‘Table One’, OIA response of 24 April 2014, a table on pages 1 to 2 in the OIA response of 26 Feb. 2015), that only contained the head office address information of the providers I asked information about, and given the fact that NO website links were provided with the original information response by MSD, it is unreasonable to expect me as a requester to go and search for any website information, in the absence of any references being made to such in the original information response.
When a requester is either unaware that such websites exist, or when a requester does not find the particular information he was looking for on a website he may find, then the Ministry cannot simply expect such a person to consider the information is publicly available. The very least one can expect in a case where the information is publicly available, is that the Ministry does then point this out, in its response, which did not happen in this case.

And the fact that a requester makes an OIA request, this does in itself indicate, the requester either doesn’t know websites where the asked for information exists, or he cannot find the information he has asked for. Also can the Ministry not expect requesters to have access to the internet, particularly if the requester happens to be a beneficiary, who has very limited financial means, while Work and Income (WINZ) offers no financial support for persons to have access to the internet. By the way, although I did in this case have access to the internet, I was neither informed about the various providers, nor that they all had websites.

And further to that, even when some of the sought information may be publicly available on the websites of some of the listed Sole Parent Employment Services (SPES) and on the now apparently phased out Mental Health Employment Services (MHES) providers, it is information that is not necessarily easily accessible, as I have found by looking for such information in early May 2015, upon having received the response. I do also not accept the explanation provided by the Ministry, that the Ministry does not actually hold the information. These providers, for which I asked information for, are being dealt with regularly by the various WINZ office staff and management, particularly when their clients get referred to work with them. The clients will most certainly not simply be referred to the ‘head office’ of the various providers, but the local, on-site offices at locations, where the service gets delivered. Hence the address details of the various localised service delivery centres of the SPES and MHES providers must be on file with WINZ, which is the main department of MSD. It would also be logical for MSD or WINZ to hold the information centrally, as it is the usual process to inform individual branch offices from their head- or regional office/s about services they can or must work with. Therefore I will not accept that the Ministry could reasonably refuse the information requested - according to section 18(g) of the OIA. So as WINZ offices have these details on file, they will also have this information on file at the various regional offices, and also at a central office, because it would not make sense to leave various regional or local offices alone to deal with such contacts, while their head office in Wellington may not even know about particulars of the on site providers. Given this, I consider that MSD must have this particular information on file, and can therefore easily provide it to me as requester.

Last not least, I note, that the Ministry did in its response of 26 Feb. 2015 not follow its obligation to inform me pursuant to section 19 OIA that the information was publicly available, as it now claims in reliance on the provisions in section 18(d) OIA. Nor did it do the same in respect of a refusal now argued as justified pursuant to section 18(g). No way how this may be attempted to be explained away, the Ministry was in breach of the OIA. I will provide some further comments re the above stated issues under ‘Request 6’, further below.

Request 3 – your provisional opinion – my further comments

Again, I will refrain from repeating and quoting my original request 3 of 1 Oct. 2014, which is known to you. You wrote in your letter with your provisional opinion: “In its letters of 24 April 2014 and 26 February 2015, the Ministry provided you with certain information but noted it did not hold ‘details of external providers staff, such as their roles and qualifications’”. “In your complaint to this Office, you noted you understood contractual agreements between Ministry and the MHES and the SPES do stipulate what minimum qualifications staff members employed by such service providers must have to deliver ‘wrap around services’.”
You also wrote: “The Ministry has noted that this information is not collected in the manner you have requested and, referring to section 18(g)(i), it notes the Ministry is not required to create information.” You then add some further comments, informing me that you made further enquiries with the Ministry on this aspect of my complaint, and that you are satisfied that section 18(g) of the OIA gave the Ministry good reason to refuse my request.

While I take note of the above, what has to this date not been sufficiently clarified by the Ministry is the following, which I wrote in my complaint to your Office dated 9 March 2015: “If these supposed “wrap around services” in a more clinical form of health support are indeed simply provided as part of the ordinary, accessible public health care services presently available through District Health Boards, I would appreciate a clear statement to that effect. This would then clarify that no extra spending is put into additional health services for WINZ clients.”

Hence, with the Ministry’s further response to your Office, I would have expected the Ministry to provide a clearer statement on this aspect raised also with my complaint, i.e. who pays for such services, what may they consist of, and so forth, than what the original OIA response of 26 Feb. 2015 contained. MSD will surely know this. For the remainder of the issues I raised re this aspect of my request 3, although I have my doubts about the Ministry’s explanations and response to your Office, I do reluctantly accept that there is little point in taking this particular matter about contracted service provider’s staff qualifications any further.

I would expect though, that MSD give a clear statement, on whether such ‘wrap around services’ that may be of a ‘clinical form’ - or providing ‘health support’, are provided through and accessible at the regular public health services, delivered by District Health Boards. Also some information on the types of such services (examples) was expected.

**Request 6 – your provisional opinion – my further comments**

You comment the following in your response letter of 24 October, which concerns the relevant aspects of my complaint about MSD’s response to my information request for on-site address details for ‘Work Ability Assessment’ (WAA) providers: “In response to notification of this aspect of your complaint, the Ministry have referred to their response to request 1, that is, that the physical address is available from the web site of the providers.” “I accept that section 18 (d) provides good reason under the OIA to refuse this part of your request on the basis that the information is publicly available.”

Again, I will here also refer to my comments that I have already provided in relation to ‘Request 1 – your provisional opinion – my further comments’, see further above. I will refrain from repeating those particular considerations, which are the same in respect to this request.

Further to that, I note from some of my own research, that for instance a provider called ‘ECS Connections’ in Taranaki, was mentioned in ‘Table Three’ in the OIA response by MSD from 24 April 2014. It was listed with a ‘Head Office Address’ at ‘16 Puketotara Street, Highlands Park, New Plymouth’, but there was no website found for this provider in May 2014, that would give me any other on-site address details.

Either their ‘Head Office’ address is also an ‘on-site’ address for service delivery, or their on-site address for service provision was, and possibly still is, not published. There are other websites that may only give one address, listed as ‘Head Office’, or that sometimes provide confusing information, so it is not always clear from the website, or other sources (e.g. Yellow Pages), where exactly the service provision address of a provider is located.
As early as in May 2014 I had also tried finding further information on ‘APM Workcare’, listed at the top of the table in MSD’s OIA response of 24 April 2014, and I read ‘New Website Under Construction’, and found little of other useful information then. The website did then only provide the ‘Head Office’ address. Re ‘Catapult’, listed second on the list in ‘Table Three’ of MSD’s OIA response then, the only address I found on their website was the same one as the ‘Head Office’ address. The same applied for instance to ‘Company Medic’, ‘Linkage Limited’ and some other providers, for which websites could be found.

I again ask you to consider, that MSD never provided any website addresses or links to such in the information provided in the first place, nor did it mention that the on-site addresses could be found on websites, hence it seems unreasonable, to later tell people, that the information is publicly available, even when in some cases it evidently is not so. It seems unreasonable to tell people who request such specified information to spend hours or days doing online searches, whether they have access to a functioning computer and internet, or not. If MSD is so certain that the information is publicly available, it should have pointed this out in the first place, and provided some information on how it may be accessed.

But I consider, like with ‘Request 1’ above, that MSD and WINZ do have the information on record anyway. This will definitely be the case at their individual WINZ offices, which regularly refer clients to such services, as one would expect. And if it is kept at individual WINZ Offices, it will also be kept on file at regional offices, and most likely at their Head Office. Hence the Ministry should still be expected to make the information that I had sought available in the form the providers’ head office information was provided to me.

Last not least, I again note, the Ministry did in its response of 26 Feb. 2015 not inform me as per section 19 OIA, that the information would be publicly available, and that it had refused the information pursuant to section 18(d). In its response dated 24 April 2014 the Ministry only used section 18(g) to refuse information on providers’ staff roles and qualifications.

Request 8 – your opinion, which appears to be ‘final’ – my further comments

In this case I must quote my original full request. I asked for the following information:
“Information on **what specific performance targets** (e.g. in measured output criteria and numbers, like in successful referral numbers for clients, in cost savings achieved for MSD and/or WINZ, or in any other tangible, countable measure) do Work and Income case managers, branch office managers, Regional Health Advisors, Regional Disability Advisors, or for that sake staff collectively operating as individual WINZ branch office teams, **have to meet, or are they encouraged to achieve?** This question is in regards to clients being referred to, or placed into employment or training, like –

- ordinary unemployed beneficiaries on the ‘Job Seeker Support’ category,
- beneficiaries on ‘Job Seeker Support’ with a health issue and/or disability (i.e. on ‘Jobseeker Support – deferred’),
- beneficiaries in receipt of the ‘Supported Living Payment’ benefit,
- beneficiaries on Sole Parent Support.

Also in relation to this, are there any performance bonuses or other forms of financial or similar “rewards” or “benefits” paid to the mentioned staff of MSD at WINZ, even if these are not directly related to specific targets achieved, but in consideration of general achievements by the various staff or branch offices? Details about types of any annual or other bonuses, special awards, benefits and similar will be appreciated.”

In my complaint to your Office, dated 9 March 2015, I wrote the following:
“My request for the specified official information has in this case also not been fully met. I did not only ask for information on “bonuses” to staff, “additional leave in recognition of service”, or similar “performance measures”, but firstly for **specific performance targets** (e.g. successful referrals of clients into work, training and so forth), which may not be linked to any
such “rewards”. Performance targets may be set for branches without bonuses and the likes being paid, simply as part of ordinary operational performance expectations, for all staff working with clients. There must be certain goals and targets that MSD sets itself and their staff, to achieve annually.”

I also referred to a radio interview on Radio New Zealand National’s ‘Nine to Noon’ program on 15 April 2014, during which MSD’s Director for Welfare Reform Sandra Kirikiri stated to Kathryn Ryan, that MSD and WINZ case managers would definitely have “targets” to meet, when working with clients, including such as those referred to MHES. I provided the following hyperlink to the downloadable audio recording:

On page 7 in its OIA response, dated 26 February 2015, the Ministry wrote: “There are no performance measures for staff to refer beneficiaries to contracted services. I am therefore unable to provide any information under section 18 (e) of the Official Information Act 1982, as it does not exist.” But it also stated: “Work and Income monitors its business indicators and the number of people on a benefit at a national, regional and service centre level.”

Your comments in your provisional opinion, dated 24 Oct. 2017, which I wish to quote, were the following:
“The Ministry provided information on the numbers and amounts of ‘performance payments’ and ‘productivity dividends’. It noted that these amounts were paid for meeting ‘agreed group measures which included increasing efficiency and reducing work duplication’. It also noted that there are no performance measures for staff to refer beneficiaries to contracted services.”

You added: “In response to notification of this aspect of your complaint, the Ministry notes that it has provided you with the information you requested.”

You also commented: “I have considered your comments and the response provided by the Ministry to your request and to my notification of this complaint. Your complaint essentially seems to rest on what you see as a potential contradiction between the information provided by the Ministry and comments made on a radio programme. However, your comments about the radio programme reflect your interpretation and extrapolation. Under the OIA, my role is to ensure that, where information is held, it is released upon request unless the Act provides good reason to refuse it. It is not part of my investigation and review role to test the overall coherence of information provided from various different sources so that a ‘better response’ (in your words) is provided.”

“I do not consider I can take this matter any further. In my view, the Ministry has clearly answered your request for information and there are no grounds for considering it is withholding relevant official information from both you and this Office.”

My response and further comments to your opinion:
While I acknowledge your position on this aspect, I am concerned that the Ministry continues to insufficiently address the contradictions I observed. I also note that since that interview, Ms Kirikiri and other senior staff of MSD have not accepted invitations to media interviews to offer further comments on the MHES trials and similar programs, as has repeatedly been confirmed in programs by Kathryn Ryan, John Campbell and others at Radio New Zealand.

While this may be a matter where I have interpreted comments by Ms Kirikiri in a way, that may not quite correspond with the actual approaches and policies followed by MSD and WINZ, it would have assisted me and the public, if MSD had provided more clarity and
answered to questions put to them, not only by me, but by others, including the media. Hence I remain unconvinced and disappointed by the response provided by MSD and that you consider that you cannot take this matter any further.

**Request 11 – your provisional opinion – my further comments**

In view of the complexity, and also particularity, of my original request, and my following complaint to your Office about MSD’s response, I see a need to once again quote my original request. I had asked the Ministry for:

“Information on **what advice or expectations MSD has communicated to medical practitioners** - like general practitioners (GPs) and also medical specialists (orthopaedic surgeons, psychiatrists, psychologists, and so forth), **for them to consider when asking questions to, and when assessing health conditions and work ability of their patients who require a ‘Work Capacity Medical Certificate’ for benefit purposes? Have particular sets of questions been sent or presented to GPs, as a format to work with, have particular criteria been communicated, beyond of what is contained in the medical certificate forms, or the ‘Guide for Designated Doctors’.** In regards to the latter, **where can a current copy of that “guide” be found**, as nothing could be found online on the Work and Income website.”

In my letter to your Office of 9 March 2015 I again quoted and stressed the following:

“I had also asked: “Have particular sets of questions been sent or presented to GPs, as a format to work with, have particular criteria been communicated, **beyond of what is contained in the medical certificate forms, or the ‘Guide for Designated Doctors’.** And:

“Last not least I also asked for a source to find the once used ‘Guide for Designated Doctors’, which has also not been provided, certainly not on the Work and Income website. All that is offered are links to download an application form (in PDF) for “designated doctors” and to access “READ Codes” to use by doctors. See the following link: [http://www.workandincome.govt.nz/community/health-and-disability-practitioners/designated-doctors.html#Resourcesfordesignateddoctors](http://www.workandincome.govt.nz/community/health-and-disability-practitioners/designated-doctors.html#Resourcesfordesignateddoctors)

That part of my question appears to also not have been answered. If there is no longer such a Guide, or if it is withheld for particular reasons, it must be expected that this is clarified. The same should be expected if that former “Guide” has been replaced by another document.”

The Ministry had responded with this in its initial information response of 26 Feb. 2015:

“Medical Practitioners provide an assessment of the impact of the individual’s disability or health condition on their ability to undertake suitable employment. The assessment also provides information that may enable an individual to work towards returning to paid employment. **All guidance for medical practitioners on about the Medical Certificate is now provided online at: www.workandincome.govt.nz.**”

I read your following considerations and comments in your letter of 24 October 2017:

“You had asked for information about advice or expectations the Ministry had provided to health professionals when assessing work ability. The Ministry referred you to the guidance provided online at [www.workandincome.govt.nz](http://www.workandincome.govt.nz).”

“You complained that you were aware that Regional Health, Regional Disability Advisors, Health and Disability Coordinators and the Principal Health Adviser regularly communicate and correspond with various health professionals. You noted that these forms of communicated advice, guidelines and expectations are not covered by the more general information on the website.”
“In response to my notification of this aspect of your complaint, the Ministry noted that ‘[t]he Ministry considers that further advice should have been refused under section 18(f) of the Act as there will not be a centralised repository of ‘advice to doctors’. Mr Xxxxxx requested ‘information’ on the advice, not the advice itself, and has been provided with this.’”

You concluded: “In the absence of a central repository of ‘advice to doctors’ I accept that section 18(f) provides the Ministry with good reason to refuse the communications you refer to on the basis that the information cannot be made available without substantial collation and research. Privacy and confidentiality considerations may also be relevant. “If there is a particular communication you are able to identify with due particularity I suggest you make a specific request for it.”

My further comments on this complaint aspect and your provisional opinion:

From your response with your provisional opinion, I understand that the Ministry has chosen to now be very ‘particular’ with interpreting my original request. Hence it has now chosen to refuse information by using section 18(f) of the OIA, after having taken a slightly different approach in their original information response of 26 Feb. 2015. In short, the responses provided by MSD are in my view nothing but an attempt of obfuscation.

The response given in the OIA response by the Ministry of 26 Feb. 2015 can be compared to a responding agency referring a requester for some specific information to go to ‘Wikipedia’ and their website, or to go and look up a Collin’s dictionary, if it may concern information about a word in the English language. The Work and Income website is a site with endless pages and substantial information, but while some information is generously provided, other information is hard to find, or cannot be found at all. I have repeatedly visited the WINZ website and made searches for the particular information I asked MSD about, and I made the OIA request, for the very reason that I COULD NOT find on the website, what I asked for.

I am concerned about your apparent acceptance of the Ministry’s responses and the further comments that were provided by MSD to your Office. I did already provide your Office with the only hyperlink that I could find then on the WINZ website, leading to only very general, and otherwise only bits of information on medical practitioners, Designated Doctors, guidelines and advice provided to them and others, in my complaint letter of 9 March 2015 (see also my quote above). That page offers NO information of any value and any significance on actual guidance provided by MSD or WINZ for medical practitioners.

It is also beyond belief that the Ministry does not make any further mention of the so-called ‘Guide for Designated Doctors’, which is definitely being held in a “centralise repository”, as it always used to be, like when I once obtained a copy of the older, long outdated version, through an OIA request to former Chief Executive Mr Peter Hughes on 24 March 2011. That was at a time, when MSD appeared to offer a slightly more constructive, helpful and more transparent approach towards requesters for official information. He listed the documents that he made available then on page 7 of his 8-page letter. He made a further reference to his information release to my ‘Question 13’ on page 3 of that letter. I will attach a copy of that OIA response to this letter, to provide evidence that I once obtained such information, which the Ministry now appears to be reluctant to provide any information about.

In my letter of 1 October 2014 I requested from MSD information about where the ‘Guide for Designated Doctors’, or any replacement document, could be found, and MSD have simply not provided any answer to this. Providing a link to their main website and its start page does again leave a requester in a situation, where he or she may have to spend possibly hours to try and find information, although the information I had sought is to this present day still not to be found anywhere on the WINZ website. The ‘Guide for Designated Doctors’ is one such main document, that used to exist, and which was provided to medical practitioners
working as Designated Doctors for the Ministry, to offer guidance on how to complete ‘Work Capacity Medical Certificates’ and how to examine and assess clients for WINZ purposes.

Hence I do not accept the explanations and new refusal grounds provided by the Ministry, and since I did make particular mention of the ‘Guide for Designated Doctors’, requesting information about where it can be found, MSD should not be able to use section 18(f) to refuse any information on where that document can be found. According to other information I was provided, the Guide was already a few years ago considered to be ‘under review’, and up to this day, there has apparently been no new copy of that guidance document published or publicly made available, not upon individual requests such as mine (see also complaint ref. 41xxxx, which was left in a ‘queue’ for allocation to an investigator for nearly two years).

I do also not accept the Ministry’s new response to you, stating: “Mr Xxxxx requested ‘information’ on the advice, not the advice itself, and has been provided with this.”

I don’t accept that section 18(f) OIA can in this case be used to refuse the information I requested on apparently standardised advice, guidelines or expectations (particular sets of questions, expectations) that MSD offers or communicates to medical or health practitioners (e.g. for training purposes), which I believe is being kept in centralised offices, such as that of the Principal Health Advisor for MSD, Dr Bratt. In any case should MSD make available a copy of the ‘Guide for Designated Doctors’, which I specified, and which is simply one known source of such forms of used guidance.

As for the ‘centralised repository’, I suggest you consider that such information may be kept in the office of Dr David Bratt, Principal Health Advisor to the Ministry, as he is responsible for this particular area of work. His Office is not one scattered all over the various WINZ Offices, any advice, guidelines and expectations get communicated from his Office to others within MSD and WINZ. Section 18(f) OIA is therefore not accepted as a reasonable, acceptable reason for refusal, which was again not even mentioned in the original OIA response of 26 Feb. 2015, as I note. So again, the Ministry was in breach of section 19 OIA.

Your comments on ‘Record keeping by Dr Bratt’ – my further comments

You commented on this: “In respect of your comments about Dr Bratt’s record keeping, I have read and carefully considered your comments of 21 May 2016 (resent on 25 August 2016). You have raised concerns about Dr Bratt ‘continually misrepresenting statistical and scientific information’ (and other concerns about Dr Bratt’s professional competency) as a response to Professor Paterson’s finding that you had an insufficient personal interest in the issue of Dr Bratt’s record-keeping. I do not see the link between your expressed concerns about Dr Bratt’s professional competency and a personal interest in Dr Bratt’s record-keeping. Moreover, concerns about Dr Bratt’s professional standards would most appropriately be addressed by his professional body, not by a layperson, such as myself.”

“For the reasons given by Professor Paterson, I do not propose to investigate your complaint about Dr Bratt’s record-keeping.”

My response and further comments

While I acknowledge your formed opinion with some disappointment, I must inform you that Dr Bratt’s professional body, being the Medical Council of New Zealand (MCNZ), does not have any responsibility for Dr Bratt’s work as Principal Health Advisor for MSD. Dr Bratt was appointed under the provisions of the State Sector Act 1988, and is therefore working in a specialist advisory role in the public service, not as a practicing doctor, providing health care.
Former Chief Executive Mr Peter Hughes, when responding to an OIA request I made on 29 Dec. 2010, clarified the following in his response letter dated 24 March 2011. On page 3 he wrote in response to my request 12:

“The Chief Executive has the authority under the State Sector Act 1988 to delegate functions to appropriate staff and has the duty to act independently in relation to staff matters. The roles of Ministry staff members listed in question 12 are therefore not specified in the Social Security Act 1964.”

That was in response to the following request I had made: “An official explanation why the positions or roles of Regional Health Advisor, Regional Disability Advisor, Regional Health Advisor, Regional Disability Advisor and Health and Disability Coordinator are not mentioned, interpreted and provided for under the Social Security Act 1964.”

It is indeed the ‘State Sector Act 1988’, and in it section 41 that covers the delegation of functions and powers by a Chief Executive to employees. Hence Dr David Bratt appears to have been appointed under that legislation, as a specially appointed Principal Health Advisor (PHA) to work for MSD and WINZ in the public service.

The Medical Council of New Zealand (MCNZ) is an authority created under, and bound by provisions of the Health Practitioners Competence Assurance Act 2003 (HPCA). Section 11 of that Act requires the MCNZ to specify scopes of practice, and according to section 5 ‘Interpretation’, an ‘authority’ is described with the following words: “authority means a body corporate appointed, by or under this Act, as the body that is, in accordance with this Act, responsible for the registration and oversight of practitioners of a particular health profession”

Sections 114 and 115 HPCA provide for the appointment of ‘Authorities’. It would appear, from the provisions, that the MCNZ was appointed according to section 115.

The MCNZ does on its website provide this information on ‘scopes of practice’:

“We identify the aspects of the practice of medicine covered by each scope of practice ie the professional service a doctor is permitted to perform. We also determine the qualifications doctors must have to be eligible to gain registration in each of these scopes. Consequently doctors in New Zealand are registered within one or more scopes of practice rather than needing a particular type of registration.

We have defined three categories of scopes of practice:

- general – e.g. resident medical officers (RMO) & doctors in vocational training
- vocational – e.g. doctors who have completed their vocational training and have been awarded (or gained) a postgraduate qualification
- special purpose scopes – e.g. doctors visiting New Zealand for a specific reason such as a locum tenens for up to 12 months

The two additional scopes, provisional general scope and provisional vocational scope, require doctors to work under supervision for at least 12 months. …”

Therefore, the MCNZ is – under the HPCA - only responsible for activities of registered members in the area of providing practice of medicine, i.e. medical treatment, not for activities such as being a consultant for other agencies, like for instance MSD, WINZ or ACC - in the public service, or alternatively in the private sector.

It would therefore be a waste of time for me to try and consult the MCNZ on Dr Bratt’s activities as a Principal Health Advisor for MSD, as he does in that role not ‘practice medicine’. From a legal point of view, his role is that of an Advisor, albeit on health matters, but he cannot be held accountable under the HPCA for anything he may say or do in a purely advisory role, where he is not involved in providing treatment to patients.
To suggest I bring matters to the attention of the MCNZ is therefore not helpful advice, as it will simply not be considered as a matter the MCNZ has any responsibility for. The only parties that could hold Dr Bratt to account for his in my view unprofessional, irresponsible conduct as PHA are firstly his employer, MSD, who have though previously indicated, that they are not concerned about his comments and actions (see comments in a provisional opinion by Prof. Paterson, page 3, section 4, re ‘Question 2’, of 22 May 2015, ref. 36xxxx). Apart from MSD, it could only be you as an Ombudsman, as you have the authority and jurisdiction to investigate Dr Bratt’s conduct, or as a last resort, it could be a court of the land to take action, should a complaint be laid, and under its jurisdiction examine and decide on a case. But to take a case to court, a complainant requires financial and other resources, which I – like many others in my situation - do not have.

With the information I provided you before, for instance a report in attachment ‘b’) to my email and letter dated 21 May 2016 (see also links on page 3), and which was resent to you on 25 October 2016, I have already provided you with some proof of what has been going on for a fair few years now. It shows how Mr Gordon Purdie, Senior Research Fellow at the University of Otago in Wellington questioned and challenged the validity of some supposed ‘evidence’ that Dr David Bratt at MSD has repeatedly used and misrepresented, potentially putting WINZ clients with health conditions and disabilities at risk of suffering harm: https://www.nzma.org.nz/journal/read-the-journal/all-issues/2010-2019/2015/vol-128-no-1425-20-november-2015/6729

This is not only about ‘record keeping, these are more serious matters to consider. The above shows some evidence, there is other also, so the evidence is there, and even a layperson can understand what this means, and it should compel you to send a warning to MSD, to advise them to stop a Principal Health Advisor misrepresenting such reports, and also other ‘evidence’, of which I have some more proof, even revealed to me earlier by MSD.

As for my supposed lack of personal interest in Dr Bratt’s conduct as PHA for MSD, I disagree with Prof. Paterson, which I have already stated in correspondence in relation to complaint 36xxxx and in my correspondence in response to his decision not to investigate Dr Bratt. Dr Bratt has through his efforts influenced general practitioners, Designated Doctors and other health professionals, plus internally used Regional Health Advisors and Regional Disability Advisors, who work collaboratively with and also under his supervision and instructions. At any time I may be expected to undergo a medical examination under the Social Security Act 1964, which could be conducted by a Designated Doctor or a GP or other professional, who may have accepted misrepresented ‘evidence’ by Dr Bratt, and who could then make a decision based on flawed, inappropriately interpreted, unreliable ‘evidence’.

One can only hope that under the new government such conduct - as has occurred for too long - at MSD will finally be ended, and that only truly scientifically proven, reliable and properly interpreted evidence is used when formulating and implementing policy in future.

Closing comments

I ask you to reconsider your provisional opinion, at least in part, after considering my further comments and evidence that I have presented above in this letter. I look forward to your final opinion on this complaint matter in due course.

Yours sincerely

Xxxxxxxx Xxxxxx
Attachments to email carrying this letter:

2). Earlier OIA response by MSD’s C.E. Peter Hughes, with which he made available a ‘Guide for Designated Doctors’: ‘MSD, O.I.A. Request fr. 29.12.10 + 13.01.11, P. Hughes, C.E., letter of reply, 8 pages, 24.03.2011.pdf’;
3). Prof. Paterson’s provisional opinion on complaint 36xxxx, indicating MSD does ‘agree’ with Dr Bratt on comments he made: ‘Ombudsmen Office, complaint 36xxxx, MSD, O.I.A. requests, new, prel. decsn, 22.05.15.pdf’.