

## **HANDLING OF PARLIAMENTARY OMBUDSMAN CASES**

### **INTRODUCTION**

1. The Parliamentary Commissioner for Administration (or Parliamentary Ombudsman) investigates complaints from members of the public of injustice arising from alleged maladministration. The powers and responsibilities of the office are set out in the Parliamentary Commissioner Act 1967. He is also empowered, as a result of the 1994 Code of Practice on Access to Government Information, to investigate complaints about refusal to provide information or about charges levied for provision of information under the Code. The booklet *"The Ombudsman In Your Files"*, published by Cabinet Office (OPS) in December 1995, provides a general introduction to the role of the Parliamentary Ombudsman, what he can investigate and what happens when a complaint is investigated. This notice deals primarily with how departments, agencies and non-departmental public bodies (NDPBs) should handle an Ombudsman case. It also sets out the steps of an investigation and the issues which need to be borne in mind.

### **POWERS OF THE PARLIAMENTARY OMBUDSMAN**

2. The Ombudsman has many of the powers of a court, including powers:
- to conduct formal investigations;
  - to require documents to be produced; and
  - to require witnesses to attend and be examined, if necessary under oath.

The Ombudsman aims, however, to proceed as informally as possible.

### **BODIES COVERED BY THE PARLIAMENTARY OMBUDSMAN**

3. The bodies which the Ombudsman is empowered to investigate are listed in Schedule 2 to the Parliamentary Commissioner Act 1967. They include Government Departments, executive agencies and a number of NDPBs.

## **HANDLING BY DEPARTMENTS, AGENCIES AND NDPBs**

4. Bodies within jurisdiction are expected to co-operate fully in investigations. The procedure for complaints about access to information will in most cases be the same as for maladministration complaints. Areas where there may be differences are noted in the relevant paragraphs below.

## **INVESTIGATIONS**

5. Generally, investigations will take place in three stages. The procedure may vary slightly, depending on whether it is a complaint of maladministration or about refusal of access to official information. Investigations of maladministration, particularly in complex cases, can take nine months or sometimes much longer. Complaints about refusal of access to information are usually dealt with within six months of acceptance of the complaint by the Ombudsman; but again, complex cases may take longer. It requires significant time and resources to satisfy the Ombudsman's enquiries over extended periods of time.

6. Advice on the handling of Open Government cases can be obtained from Open Government liaison officers appointed in all main departments or agencies, or from the Department for Constitutional Affairs on 020 7210 8755.

### **Stage 1 of the Investigation - Initial Complaint and Response**

7. The Parliamentary Commissioner Act 1967 (Sections 7(1) and 10(2)) places on the Ombudsman certain obligations in respect of "the principal officer" of the body which is the subject of the investigation. The Ombudsman must give the Principal Officer of the body concerned and any other named official complained against, an opportunity to comment in writing on the allegation. For these purposes, the Principal Officer in charge of the department is the Permanent Secretary or senior officer in charge of the department.

8. In most cases Next Steps agencies legally, remain part of a department. Their Principal Officer is therefore the Permanent Secretary of the department rather than the Chief Executive. However, there are a few agencies which are formally non-Ministerial government departments in their own right; and in those cases, the Chief Executive is the Principal Officer.

9. Permanent Secretaries may delegate to the Chief Executive of an agency the day-to-day responsibility for handling Ombudsman investigations concerning matters delegated to the agency in its Framework Document. Where this practice is followed, the Ombudsman should be notified. He will then normally send concurrent notice of investigation and draft reports to both the Permanent Secretary and the Chief Executive, and his normal contact point during the course of an investigation will be through the Chief Executive's office, unless other arrangements have been agreed.

10. In the case of The Scottish Office, the practice is that, if an investigation concerns one of its Departments, the Ombudsman communicates direct with the relevant Head of Department, with a copy to the Permanent Secretary. Similarly, where a complaint concerns an Agency of The Scottish Office, the Ombudsman will send concurrent notice of investigation to the Chief Executive and to the relevant Head of Department, rather than to the Permanent Secretary.

11. The Principal Officer of an NDPB is the person in charge of the body's administration, who is normally the NDPB's Chief Executive and Accounting Officer. The Principal Officer of the NDPB should bring to the attention of the sponsor department any complaints accepted by the Ombudsman for investigation, even if he or she is satisfied that there is a complete and satisfactory explanation of the matters involved.

12. The Ombudsman normally asks for responses within three weeks and every effort should be made to meet this timetable. If the response is delayed by more than six weeks (three weeks in Open Government cases) from the receipt of the Ombudsman's letter, he is required to report the matter to the Public Administration Select Committee.

13. In Open Government cases departmental Open Government officers or the Department for Constitutional Affairs can advise on what should be included in draft responses to the Ombudsman and on precedents set by previous cases. The Department for Constitutional Affairs also issues '*Guidance on Interpretation of the Code of Practice on Access to Government Information*' which contains a number of pointers on how the Ombudsman expects requests for information to be handled.

14. Open Government cases may involve requests for a particular piece of information made to various bodies holding the same material. In these cases the bodies concerned should consult each other on the approach they intend to take in response to any complaint made to the Ombudsman over non-disclosure. If the bodies involved cannot agree on a common approach, they may wish to invite the Department for Constitutional Affairs to mediate with a view to agreeing a consistent position. Alternatively they may prefer to submit differing responses to the Ombudsman, although such an approach should for obvious reasons be avoided if at all possible. '

## **THE COMPLAINANT**

15. Complaints come from members of the public but must be referred to the Ombudsman by Members of the House of Commons. The Ombudsman may contact the complainant direct to get more information.

16. In consulting sponsor departments, NDPBs should always bear in mind the need to preserve the privacy of complainants and the confidentiality of Ombudsman investigations. Information about the complaint should be disclosed only to the extent necessary to carry out effective consultation and should not normally require the disclosure of information about the identity or personal circumstances of the complainant.

17. Bodies concerned must continue to deal with the issue under investigation in the normal way of public business wherever this is possible. The Ombudsman may be consulted if there are problems in doing so. There is no intention that the body concerned should be deprived of its freedom to take such further action it considers necessary or desirable and, where there is a complaint about delay, it would clearly be inappropriate for the body not to continue to process and consider the relevant matter in the normal way. If the body concerned has other dealings with the complainant, these matters should continue to be dealt with in the normal way. They should in no way be impeded or influenced by the fact that an investigation is current.

18. There may be less scope for this with complaints about access to information, where other requests for the same information or type of information may need to await the outcome of the investigation.

### **COMPLAINTS AGAINST INDIVIDUALS**

19. Complaints will usually be about action taken by or on behalf of a department, agency or NDPB. Occasionally, however, the actions of individuals will be called into question. When this happens, bodies are advised:

- to make sure that those concerned are treated fairly; and
- to protect the proper interests of all those who appear to become at risk during the course of the investigations.

20. Complaints against individual civil servants should be rare in Open Government cases, since internal review will precede the Ombudsman's investigation. Such complaints may, however, occasionally arise in cases of delay, or where the handling of a request is said to have been otherwise maladministrative in some other way.

21. **Where individuals have been identified, departments, agencies and NDPBs must:**

- make them aware of the nature of the complaint; and
- give them an opportunity to explain their position. The individual may be accompanied by a trade union representative.

22. This should be done either when the complaint is first referred by the Ombudsman to the Principal Officer or during the Ombudsman's subsequent investigation if further issues arise.

23. The Ombudsman's investigations are carried out in private. The Ombudsman will not name individual officers in his final report unless this is unavoidable.

## NAMED INDIVIDUALS

24. Where the complaint relates to the action of an individual who is named, or who can be identified, the Ombudsman will send two copies of the complaint to the Principal Officer:

- one copy for the body concerned to comment on; and
- one copy to be passed to the individual concerned.

25. The bodies concerned should ensure:

- that the individual gets the personal copy in adequate time to comment before the body sends its views on the complaint to the Ombudsman; and
- that the personal copy is accompanied by a note from the Ombudsman explaining the individual's right to comment direct to the Ombudsman or through the body.

26. Any official who is said to have been at fault during the course of an investigation must be given an opportunity to comment to the Ombudsman.

27. Comments may be written or oral. It will, however, make the Ombudsman's task easier if comments at this stage are written.

28. Anyone who is the subject of a complaint may understandably be anxious to take every possible step to protect himself or herself. If an individual is reluctant to offer written comments he or she may be reminded:

- that the Ombudsman's purpose at this stage is to see whether the complaint needs further investigation. The Ombudsman will decide this in the light of the body's Stage 1 comments; and
- that there will be an opportunity to give oral evidence to the Ombudsman's officers if the Ombudsman decides to continue with the investigation. This point will have been made in the Ombudsman's note covering the individual's copy of the complaint.

An individual can comment either through his or her Department or direct to the Ombudsman. In the latter case, it is for the Ombudsman to seek to resolve any inconsistency between the individual's comments and those of the body.

## Stage 2 of the Investigation - Full Investigation of Complaint

29. The Ombudsman may decide to take an investigation further by:

- further correspondence with the department, agency or NDPB;
- examination of the body's papers (which may include information relating to periods well before and after the specific incident which is the subject of a complaint); and
- discussion with staff in the body, either those who have been complained against or others.

30. The Ombudsman is entitled to examine all relevant departmental papers (including Ministerial correspondence), except those relating to proceedings of the Cabinet or Cabinet Committees. By convention, the Ombudsman does not normally ask to see the working *file* on an Ombudsman complaint, although he reserves the right to do so under exceptional circumstances. The working file will be the file set up to cover the department's handling of its correspondence with the Ombudsman once a complaint has been received.

31. Any information or comments provided, however informally, are regarded by the Ombudsman as evidence for the purpose of his investigation and may be quoted in his **report**. **If it subsequently comes to light that an error has been made in any information** given to the Ombudsman, it should be corrected as swiftly as possible.

32. The Ombudsman has authority: "to determine whether any person may be represented by counsel or solicitor or otherwise in the investigation".

33. The question of representation is not likely to arise if the Ombudsman takes evidence in the way set out above. The Ombudsman may, however, take an investigation further through:

- taking oral evidence from anyone who has been complained against or who is identified as having been at fault during an investigation; or
- holding a formal inquiry (though that is very rare).

In these cases, the question of representation is more likely to arise.

34. In the case of oral evidence from someone who has been complained against, the Ombudsman normally allows the person concerned to be accompanied (but not represented) by a trade union representative or another work colleague. Legal representation may be appropriate if there is a formal inquiry, or if a case develops in such a way as makes it seem likely that the Ombudsman's report will seriously criticise the conduct of an identifiable person.

35. **Anyone complained against has the right to be legally represented if a complainant is legally represented.**

36. The Ombudsman will review the position if it appears during an investigation that there is a real risk of an individual's conduct being criticised publicly. This applies whether or not the complaint was directed at the individual. The Ombudsman will decide:

- the manner in which the investigation will continue;
- the way in which the person at risk will be given an opportunity to explain himself or herself; and
- the question of representation.

37. If the person complained against is to be legally represented:

- the department, agency or NDPB may arrange with the person complained against to be represented by its own legal staff (in which case the question of cost will not arise); or
- the individual may arrange for outside legal representation (in which case the Ombudsman has discretion to refund the costs involved, within certain limits).

Cases where legal representation is regarded as necessary are extremely rare.

### **Stage 3 of the Investigation - Draft and Final Ombudsman Report**

38. When the investigation is complete, the Ombudsman nearly always sends the draft report to the Principal Officer of the body for comments, and invariably does so if it involves criticisms of identifiable individuals. The Ombudsman will require the draft report to be shown to anyone who has been criticised in the report (and to others who may be affected, unless the Principal Officer considers that this would not be appropriate).

39. When the Ombudsman sends the draft report to the Principal Officer of an NDPB for comment, that officer would be expected to inform the sponsor department of any recommendations in the draft report and in due course of the proposed response.

40. The Ombudsman's draft report will indicate:

- whether complainants have suffered injustice due to maladministration;
- whether any injustice has been, or needs to be remedied; and
- what remedy the Ombudsman recommends (for example, financial compensation (see paragraph 61); changed procedures; revised instructions; release of information).

41. Where unquantified financial redress is recommended, it may be appropriate for the body concerned, unless such action is likely to raise expectation unrealistically, to consult the complainant on the nature of the redress expected by the complainant.

42. There is no specific deadline for comments on a draft report, but there is a general expectation that comments should be provided in about three weeks.

43. In cases where the Ombudsman finds that information has been wrongly withheld, he will normally recommend release rather than publishing the information himself in his report. The latter course of action remains an option for him, but he is unlikely to exercise it in other than exceptional circumstances.

### **Response to Draft Report**

44. The Principal Officer should draw the attention of the Ombudsman to:

- any factual inaccuracies in the proposed report;
- any relevant factual evidence which appears not to have come to light in the course of the investigation;
- action proposed in relation to a recommended remedy.

45. When responding to a draft report, the Principal Officer is expected, where appropriate, to give some indication of the action that will be taken to implement the Ombudsman's recommendation and may discuss with the Ombudsman at that stage any financial or other remedy that may have been recommended.

46. In openness cases it may be decided before the Ombudsman has completed his investigation that the material in question should, after all be disclosed (whether as a result of a change in disclosure policy or because the time elapsed since the request has sufficiently reduced the sensitivity of the information sought). In such cases the resulting disclosure will often obviate the need for any further action by the body or the Ombudsman.

### **Final Report**

47. After taking account of the Principal Officer's comments the Ombudsman will:

- send the final report to the Member of Parliament who referred the case; and
- send copies of the report to the Principal Officer of the body concerned and to any individuals against whom the complaint was made.

48. The Ombudsman's recommendations are not legally binding, but Ministers have made clear to Parliament that they will be accepted. In the very rare case where a body proposes not to accept the Ombudsman's recommendation, the department should notify the Cabinet Office (020 7276 2471) as soon as possible.

49. In rare cases, the Ombudsman may make a special report to both Houses of Parliament where he considers that injustice caused by maladministration has not been, nor will be remedied.

50. The Ombudsman's finding is final: there is no avenue of appeal (although the complainant can apply for a judicial review of the Ombudsman's decision.).



## **APOLOGIES**

51. A direct apology to the complainant should always be sent from a senior officer (normally the official with overall responsibility for the organisation concerned, whether Permanent Secretary, Agency Chief Executive, Regional Director or Controller, etc). The timing of the apology will depend on individual circumstances. Departments should ensure that, where fault was less clear cut and remained at issue during the final stage of the Ombudsman's consultations or a draft report, the apology should not be sent before receipt of the Ombudsman's final report.

## **CHANGES TO PROCEDURES**

52. Where mistakes have been made, the priority of the organisation should be to avoid a "blame culture" (where staff feel threatened by complaints and defensive about receiving them). Guidance should instead encourage the ready admission of mistakes, the provision of swift and effective redress and steps to ensure that a similar failure does not recur. Any attempts to conceal maladministration or its direct consequences will be considered a disciplinary offence. This is set out in paragraph 6 of the guidance note produced in July 1996 by the Cabinet Office (OPS) Citizen's Charter Unit, entitled *"Redress under the Citizen's Charter: Guidance for Departments and Agencies"*.

53. *"Redress under the Citizen's Charter"* (paragraph 15) also states that in cases of maladministration, the body concerned should seek to identify, wherever reasonably practicable, all those affected and offer appropriate redress. There may be a few instances where the process of seeking out others who may have suffered would prove so burdensome administratively that it would have an impact on the organisation's day-to-day operations, or the capacity to remedy a systemic failure which has been the primary cause of maladministration. In these circumstances, resources would be more appropriately used to improve services and to address systems failures to ensure that maladministration does not recur.

54. In Open Government cases where the Ombudsman has recommended disclosure the body will need to consider the format in which to release the information; ie, whether through pre-existing documents or through summaries of the material in question. Advice on this point can be found at paragraph 52 of the *'Guidance on Interpretation of the Code of Practice on Access to Government Information.'*

55. Within the constraints of resources available, departments, agencies and NDPBs should record and analyse complaints for trends; set targets for reducing recurring failures; look for any repetition or pattern in failures to meet standards or in maladministration; and take action to change systems or procedures where necessary (see paragraph 5 d. of *"Redress under the Citizen's Charter"*).

56. In addition, each department, agency or NDPB should consider why their own complaints systems failed to resolve satisfactorily any complaints they received which the Ombudsman considered were justified.

57. The Cabinet Office circulates summaries of cases, produced by the Ombudsman's office, to departments, agencies and NDPBs, together with a note on "lessons to be learned". The aim is to spread best practice and to prevent bodies from repeating the mistakes made by other bodies. It also disseminates to departmental Open Government officers the summaries of the Open Government cases, produced by the Ombudsman's office.

58. Departments are asked to inform the Cabinet Office if:
- as a result of an Ombudsman report, they are considering changes of procedure which could affect the position of other Departments;
  - there are any significant or unusual developments in individual cases; or
  - there is any change in policy on disclosure of information brought about by an Ombudsman's investigation.

## **FAILURE TO MEET STANDARDS**

59. The Parliamentary Ombudsman's findings in a 1994 MAFF case referred to the difference (in terms of redress) between: failure to meet mandatory or promised standards to which people consider they have a right or entitlement; and failure to meet indicators of satisfactory performance, ie targets. The key issue here is what users of the services have been told they can expect - namely what is set out in any Charter statement as standards or as indicators of satisfactory performance. In a statement by the Ombudsman in November 1993, he said:

"If targets are expressed as mandatory or a promise has been given that the citizen has an expectation to compensation, should they not be met or should they be missed by a specified period, the case for compensatory redress is strong. Otherwise targets are to be taken as indicators of a satisfactory or unsatisfactory performance rather than as a firm commitment that a specific performance will be achieved in every individual case. They will be persuasive indicators, but they are not positive guarantees. On the one hand it will not automatically be the case that, simply because such a target has been missed, a Department will necessarily be at fault and compensation will be due. On the other hand it will not automatically be the case that, simply because such a target has been met, a department's performance will necessarily have been fault-free or that an argument for considering compensation can be ignored. Cases need to be considered on their individual merits and in the light of their individual circumstances."

## **DISCIPLINARY ACTION**

60. The Principal Officer is responsible for any disciplinary action taken against individuals in response to an Ombudsman's report. The Select Committee on the Parliamentary Commissioner for Administration, when considering the Ombudsman's special or annual reports, may ask about the nature of any disciplinary action taken by the body. For further information, please refer to the section on 'Conduct of individual officers' in the new edition of the Cabinet Office (OPS) guidance "*Departmental Evidence and Response to Select Committees*".

## **PAYMENT OF COMPENSATION**

61. Guidance on compensation payments by departments, agencies and NDPBs in cases where maladministration has occurred is set out in detail in Chapter 36 of *Government Accounting*, issued on 28 March 1996 under DAO(GEN) 7/96 "*Financial Redress - Maladministration and Charter Standards*". The main points in relation to Parliamentary Ombudsman cases are as follows:

- The Parliamentary Ombudsman may recommend that the department or body concerned should provide redress for the complainant and for any others who may have suffered in the same way. Redress may be an explanation, an apology, an undertaking to improve procedures or systems, an *ex-gratia* payment or a combination of such measures.
- If it is concluded that financial redress is appropriate, an amount should be identified which is fair and reasonable, but no more, in the light of all the facts and circumstances of the case.
- "Reasonable" is likely to mean restoring the complainant's financial position to what it would have been if the maladministration or failure had not occurred.
- Compensation payments in Parliamentary Ombudsman cases may include an element for delay. If so, this should be explained to the complainant. If the element has been calculated as an interest payment, the way in which the calculation has been made should also be explained. Generally, recipients of financial redress should be given an explanation of its basis: the *Code of Practice on Access to Government Information* commits bodies to give reasons for administrative decisions to those affected.
- The Parliamentary Ombudsman may include an element for additional costs incurred in pursuing the original problem in a recommendation for financial payment. Complainants may also seek reimbursement of the cost of bringing a complaint before the Ombudsman. The Ombudsman has said that it is not his normal practice to recommend that departments should pay such costs.
- The Parliamentary Ombudsman has said that he recommends "consolatory" payments (for inconvenience, annoyance, frustration, worry, distress, etc) only in exceptional circumstances.

#### Reference of cases to the Treasury

62. As regards compensation cases, departments, agencies or NDPBs need consult the Treasury only if:

- the case falls outside the body's delegated authorities for *ex-gratia* payments; or
- the case is novel or contentious; or
- a payment could set a potentially expensive precedent or cause repercussions for other departments, agencies or NDPBs.

For further advice on this and on compensation payments generally, see Chapter 36 of *Government Accounting*.

## MALADMINISTRATION

When the Parliamentary Commissioner Bill was being taken through Parliament in 1966, Mr Crossman, as Leader of the House of Commons, gave examples of maladministration as follows:

"bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on."

This is known as the "Crossman Catalogue".

Additional examples of maladministration in the language of the 1990s (quoted in the Parliamentary Ombudsman's 1993 Annual Report and endorsed by Treasury Ministers in November 1994 in evidence to the PCA Select Committee) are:

- rudeness (though that is a matter of degree);
- unwillingness to treat the complainant as a person with rights;
- refusal to answer reasonable questions;
- neglecting to inform a complainant on request of his or her rights or entitlements;
- knowingly giving advice which is misleading or inadequate;
- ignoring valid advice or overruling considerations which would produce an uncomfortable result for the overruler;
- offering no redress or manifestly disproportionate redress;
- showing bias, whether because of colour, sex, or any other grounds;
- omission to notify those who thereby lose a right of appeal;
- refusal to inform adequately of the right to appeal;
- faulty procedures;
- failure by management to monitor compliance with adequate procedures;
- cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use a service;
- partiality; and
- failure to mitigate the effects of rigid adherence to the letter of the law where that

produces manifestly inequitable treatment.

Neither of these lists is intended to be a comprehensive definition of maladministration.