

19 February 2015

Kevin Stewart MSP
Convener of the Local Government and Regeneration Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

Dear Convener,

Thank you for your letter of 8 February 2015. I am very happy to respond to your request for additional comments.

The review process

I am pleased to put on record again that all delegated decisions can enter this process. As I explained in my previous response, the criteria are used to ensure consistency and fairness and provide important tests of the soundness of the decision that has been reached. The criteria are not used as a barrier to prevent a case entering the process. They are the criteria against which the decision is tested within the process.

The review process is not required by statute but it is important to me to ensure that the quality of decision-making is high. That is why I introduced and continue to use this process.

The reason this is called the review process is because, if I consider the criteria have been met, the decision itself may be changed, or the complaint may be reopened and reinvestigated. I am deliberately careful to say, if the criteria are met, that the decision is eligible for review or revision and not that the decision will be changed. This is because in some cases I have agreed that the criteria have been met but, sometimes after significant reinvestigation, ultimately the same decision is made, albeit for different reasons

It may help if I explain what happens when such a request is received. I also think it is worth noting that, prior to reaching the request for review stage, each letter issued provides an invitation to the person to have a detailed discussion about the decision direct with the Complaints Reviewer. This is often used before someone enters the review process and means there will have been an opportunity for them to have some additional clarification about the decision prior to this.

When a request is received, it is acknowledged so the person or organisation knows it is in the process. We check the information received to ensure we understand the points that are being raised. We ask the Complaints Reviewer who made the delegated decision to write a note commenting on the points. The points raised and are then considered carefully in light of all the information we hold on file which can be considerable. The file is usually re-read in full as part of this process. There may be further discussions and sometimes, further fact finding or even legal advice at this point. I then send a letter to the person or organisation which requested the review. It is only *at this stage, after all the work above*, that I confirm whether or not the criteria have been met and whether or not the decision is eligible for review, ie that we should consider changing the decision. The letters which say a decision is not eligible are often very detailed and, as well as explaining why the criteria have not been met, respond to concerns that were raised that do not meet the criteria, which I hope will explain or clarify the reasons for the original decision and the decision not to change that.

We do not seek to block access to this process. Every letter issued that contains a delegated decision provides information about the process. Information is also available about the process on our website.

It is our experience that where people are concerned that the information we provide is unclear or confusing that this is raised through our service delivery process. As a result of such complaints, we have improved the information we provide. While we have had a number of detailed complaints about our service from individuals who have also used the review process, this particular concern has not, to date, been raised. However we always consider carefully feedback on the information we provide and I will ask for the correspondence with the Committee to be considered when we next review this literature.

The Committee has also asked about how decisions made by me personally relate to the review process. The only decisions personally approved by me in full before they leave the office are the most significant investigations where it is intended there will be a public interest report published. These decisions are issued in draft and I approve the draft decision. They are issued in draft form to allow the organisation and the individual to comment before the decision is finalised. At this stage, they have the opportunity to highlight any factual errors etc, similar to the review process. The final version is sent to Parliament when I have considered the comments and agreed whether or not any changes need to be made as a result. In very unusual cases, if I consider there have been material changes, a second draft may be issued.

I can be asked by Complaints Reviewers to give advice on other cases where a public report is not going to be issued and do so occasionally. Any involvement I have is clearly noted on the file to ensure full transparency in the process. However, the decisions make it clear that the decision on those cases was made with delegated authority and requests for review can be made in relation to those cases.

I appreciate that organisations and individuals who disagree with my decisions would like the opportunity for further review and even for someone completely different to look again at the decision made. However, the whole reason for Parliament creating an Ombudsman was for there to be an independent, final stage to the complaints

process. Like all public organisations, I am subject to the jurisdiction of the Courts so the finality relates purely to the free complaints process.

Finally, I can confirm that overlooking a material fact or misunderstanding a complaint would be factual errors in terms of the criteria. I find, however, that often what a person or organisation considers is an error is actually a disagreement about the way facts are to be interpreted.

Question 14

The rules which apply to the release of information apply to information we receive from an individual as much as they apply to information we receive from an organisation and this is why I referred in my answer to question 14 to the previous answers which set out that legislation in some detail.

I can only release information, however gathered or obtained, for the purposes of the investigation (section 19). This means I can only release information when that release has a purpose. I am legally required to ensure that the organisation is informed of the allegations made and that they have an opportunity to respond (section 12). As part of our process, I discuss with the complainant their concerns and I put these direct to the organisation with any supporting material I consider they need to understand this. It is important to note that the inquisitorial approach of an organisation such as ourselves is different from the adversarial nature of the courts. Individuals who want to use our services do not need lawyers to support them and it is my role to ensure I understand their concerns and, while I am limited to considering their complaint, I am not restricted, as I understand a court would be, to only being able to consider the arguments or evidence made by that individual. Instead, once I have agreed the complaint with them, I am responsible for ensuring I consider the best arguments and evidence I can find about that matter before coming to a decision.

I have had requests from organisations for the original document submitted to me. This has clearly been on the basis that the organisation considers they could undermine the complaint by showing the points being made to me were not made as well or as clearly as the questions I am putting to them. It is important that organisations understand that, as long as I can demonstrate the substance of the complaint was put to them, it is my questions about that complaint that they need to respond to. It is also important to note that the reason Ombudsmen were set up to take such an inquisitorial approach was to redress the significant power imbalance that there is between a large public organisation and an individual.

Finally, I would like to point out that it is usually the case that any additional documentary evidence provided by the person bringing the complaint to me consists of correspondence with the organisation. It is hard to argue there is a purpose in terms of section 19 for sending the organisation correspondence that they have already seen and considered. However, in cases where new and material evidence has been provided by the person bringing the complaint this is provided to the organisation for comments.

Questions 15 and 16

The position on the customer satisfaction process has not changed since December. I did not want to repeat information that had already been provided. If the position had changed, of course, I would have updated the Committee.

Question 18

I can confirm that question 18 and 20 should be read together. I appreciate that wasn't clear. For the reasons set out in question 20 it is rare that my investigations will touch on or find actual corruption so it would not be appropriate to limit the public interest tests to this. Any investigation that found this had occurred would almost certainly meet the public interest criteria – particularly around significant injustice.

I hope this additional clarification is helpful.

Yours sincerely

Jim Martin
Ombudsman