

## Text message to Prime Minister from journalist concerning ponytail pulling incidents—no blanket confidentiality for ‘off the record’ communications

<b>Legislation</b>	Official Information Act 1982, ss 9(2)(a) and 9(2)(ba)
<b>Agency</b>	Prime Minister
<b>Ombudsman</b>	Judge Peter Boshier
<b>Case number(s)</b>	404843; 407022
<b>Date</b>	February 2016

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### Summary

Two complaints were made to the Chief Ombudsman about the Prime Minister’s refusal of requests made under the Official Information Act 1982 (OIA) for communications that he or his Office had with a journalist for the New Zealand Herald, Ms Rachel Glucina, regarding the pulling of a waitress’ hair by the Prime Minister at Rosie, a cafe in Parnell (Rosie Cafe).

At issue in this case was a single text message that was sent by Ms Glucina to the Prime Minister on 22 April 2015.

The Prime Minister’s Office stated *‘it is not the practice of the media team or the Prime Minister to divulge details of the communications from journalists’* and refused the request on grounds of privacy (section 9(2)(a)) and that it was subject to an obligation of confidence (section 9(2)(ba)). The Prime Minister asserted that he did not believe there was an overriding public interest in disclosure.

In the circumstances of this case, the Chief Ombudsman formed the opinion that it was not necessary to withhold the information to protect either the privacy interests of the individuals concerned or any obligation of confidence to Ms Glucina.

The Chief Ombudsman said that there is no blanket protection for *‘off-the-record’* communications between Ministers and members of the media. He was clear that each case must be considered on its own merits.

Further, the Chief Ombudsman considered that even if an obligation of confidence protected under the OIA did exist, this would have been outweighed in the circumstances of this particular case by the public interest in disclosure.

Consequently, the Chief Ombudsman concluded that the requests should not have been refused and recommended release of the content, timing and circumstances of the text message.

## Background

1. On 23 April 2015, a request was made to the Prime Minister via the [fyi.org.nz](http://fyi.org.nz) website for *'a record of all contact with Rachel Glucina (since 1 March 2015) and yourself or your office, in any capacity, regarding the Rosie cafe, its owners or employees. Please provide all emails, text messages, or social media messages, of the above.'*
2. On 20 May 2015, the requester was advised that: *'[i]t is not the practice of the media team or the Prime Minister to divulge details of the communications with journalists. This would also extend to any communications the Prime Minister or the media team has had with Rachel Glucina. Therefore, any information relevant to the scope of your request is withheld...'*
3. The grounds relied on to withhold the information were sections 9(2)(a) and 9(2)(ba) of the OIA.
4. Section 9(2)(a) allows information to be withheld where this is necessary to protect the privacy of natural persons.
5. Section 9(2)(ba) allows information to be withheld where this is necessary to protect information subject to an obligation of confidence, where the making available of the information:
  - a. would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied (section 9(2)(ba)(i)); or
  - b. would be likely otherwise to damage the public interest (section 9(2)(ba)(ii)).
6. The Prime Minister asserted that no public interest existed in releasing the withheld information sufficient to override the reasons for withholding it.
7. On 22 May 2015, a second requester asked *'whether the Prime Minister or his office holds information on contacts with Rachel Glucina about the pony-tail pulling incident; and whether the Prime Minister or his office holds information on contacts with Rachel Glucina about the pony-tail pulling victim'*.
8. This requester explained that he had seen the earlier request and response on [fyi.org.nz](http://fyi.org.nz) and was seeking this information further to public statements by the Prime Minister that he had *'nothing to do'* with Ms Glucina's exposure of the waitress concerned.

9. On 22 June 2015, the Prime Minister's office responded, advising that the decision made on the earlier request would stand and relying on the same provisions of the OIA to refuse the second request.

## Investigation

10. In August 2015, then Chief Ombudsman Dame Beverley Wakem notified the Prime Minister of the two complaints she had received and requested the information at issue, together with an explanation of the reasons for withholding.
11. In December 2015, Judge Peter Boshier succeeded Dame Beverley as Chief Ombudsman and assumed responsibility for this investigation.

## The information at issue

12. In the report to the Chief Ombudsman, the Prime Minister's Office stated that the information coming within the scope of the request consisted of a single text message from Ms Glucina to the Prime Minister, received while he was overseas.
13. In this report, the Chief Ombudsman was also advised that the text message was unsolicited and that the Prime Minister did not respond to it. The text message was subsequently deleted but the content, as conveyed to staff in the Prime Minister's Office, was reproduced in the report to the Chief Ombudsman.
14. Only information held by the Prime Minister in his capacity as Prime Minister and Minister of the Crown is '*official information*' for the purposes of the OIA. During the Chief Ombudsman's investigation, the Prime Minister's Office queried whether the text message could in fact be categorised as '*official information*' for the purposes of the OIA. It was contended that the information may have been received by the Prime Minister in a different capacity.
15. The Chief Ombudsman considered but rejected this argument, noting it was the Prime Minister's Office itself that had made the decision to treat the text message as official information. Further, all explanations provided during the course of the investigation supported that position. In the absence of any evidence that it was received by the Prime Minister in any other capacity, the Chief Ombudsman concluded that it was held in the Prime Minister's capacity as Minister of the Crown and, as such, the OIA applied.

## Application of section 9(2)(a)—privacy

16. Section 9(2)(a) applies if it is necessary to withhold information to protect the privacy of natural persons.
17. Following consultation with the Privacy Commissioner, the Chief Ombudsman considered the respective privacy interests of the parties involved.

18. Ms Glucina, the Prime Minister and the waitress at the centre of the incident were consulted during the course of the investigation and the views of each affected party were taken into consideration by the Chief Ombudsman in forming his opinion in this matter.
19. Given the nature and amount of information already in the public domain, the Chief Ombudsman concluded that it was not *'necessary'* to withhold the information at issue to protect the privacy of the relevant individuals. This opinion was largely accepted by the Prime Minister during the course of the investigation. The remaining issue to be considered, therefore, was whether good reason existed to withhold the information on grounds that it was subject to an obligation of confidence.

## Application of section 9(2)(ba)—obligation of confidence

20. Section 9(2)(ba) provides for withholding information where this is necessary to:
  - (ba) *protect information which is subject to an obligation of confidence ... where the making available of the information—*
    - (i) *would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or*
    - (ii) *would be likely otherwise to damage the public interest*
21. Generally speaking, this section is relevant where a third party has provided the information to a public sector agency on the understanding it would remain confidential.
22. The Chief Ombudsman noted that the decision to refuse the requests appeared to rely on a purported broader, unspoken convention that *'off-the-record'* communications with members of the media fall within scope of a wider obligation and protection of confidence.
23. The Chief Ombudsman clarified that there is no blanket protection under the OIA for *'off-the-record'* communications between Ministers and members of the media. Each case must be considered on its own merits and the suggestion that there may be a convention of confidentiality which overrides the OIA is unfounded. This was acknowledged by the Prime Minister's Office.
24. The Chief Ombudsman did accept that there may be occasions where an *'off-the-record'* communication from the media to a Minister might need to be withheld to protect an obligation of confidence. This was not such a case. In his report to the Chief Ombudsman, the Prime Minister had identified that the text message, a communication of Ms Glucina's opinion to the Prime Minister about the subject of her interview, was unsolicited by him, he had not responded and the text had not been retained. Therefore in all the circumstances of this case the Chief Ombudsman could not see any basis to accept that the text message was subject to an obligation of confidence. It had been

volunteered; was not prefaced with restrictions or caveats; and the Prime Minister was able to make use of it as he saw fit.

25. Whilst there are statutory privileges available to journalists, to protect their sources, the situation where a journalist is freely expressing an unsolicited opinion to a Prime Minister is in a completely different realm.
26. In the circumstances of this case, the Chief Ombudsman was also not satisfied that making the information available would be likely to prejudice the supply of similar information or information from the same source, where it is in the public interest that such information should continue to be supplied; or would otherwise damage the public interest.
27. The Chief Ombudsman observed that journalists are more aware than most of the provisions of the OIA and the principle of availability that *'information shall be made available unless there is good reason for withholding it'*.<sup>1</sup>
28. Regardless, the Chief Ombudsman considered that, even if an obligation of confidence did exist, under section 9(1) of the OIA, the considerations favouring disclosure in the public interest in the circumstances of this case (namely the accountability of the Prime Minister) would outweigh any need to protect confidentiality. In reaching this conclusion, the Chief Ombudsman noted the existence, timing and content of the text, the Prime Minister's role in the precipitating event and his public denial of any involvement with the interview.<sup>2</sup>

## Outcome

29. For the reasons outlined above, the Chief Ombudsman formed the final opinion that good reason did not exist to withhold the text message in reliance upon the OIA.
30. The Chief Ombudsman recommended that the Prime Minister release the content, timing and circumstances of the text.
31. The Prime Minister accepted the Chief Ombudsman's final opinion and agreed to release the information at issue.

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<sup>1</sup> Section 5, OIA.

<sup>2</sup> May 18, Post Cabinet Conference (referring to the Herald interview) – *'Yeah no I had nothing to do with that..'*.