

# Opinion of Chief Ombudsman (Abridged) - Request for legal opinions about a key term in Human Assisted Reproductive Technology Act 2004 - public interest in access by a senior health researcher outweighs legal professional privilege

<b>Legislation</b>	Official Information Act 1982, ss 4, 9(1), 9(2)(h) Human Assisted Reproductive Technology Act 2004, ss 5, 16
<b>Requester</b>	Professor Cindy Farquhar
<b>Agency</b>	Ministry of Health
<b>Request for</b>	Crown Law opinion dated 18 February 2014 and Health Legal opinion dated 27 November 2013
<b>Ombudsman</b>	Judge Peter Boshier
<b>Case number(s)</b>	378663
<b>Date</b>	16 February 2016

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## Summary

Health researcher Professor Cindy Farquhar complained about a decision made by the Ministry of Health (the Ministry) to refuse her request for a copy of two legal opinions, one from Health Legal, the other from Crown Law (the legal opinions). The Ministry had sought this legal advice to clarify the interpretation of the statutory term ‘uses’, referred to in section 5 of the Human Assisted Reproductive Technology Act 2004 (HART Act). The Ministry then provided the legal opinions to the Ethics Committee on Assisted Reproductive Technology (ECART). ECART considered, in light of this advice, whether Professor Farquhar’s proposed Day of Transfer study (DOT study) would involve the ‘use’ of embryos and concluded that it would. ECART therefore declined Professor Farquhar’s application to proceed with the DOT study until such time as guidelines had been agreed by the Advisory Committee for Assisted Reproductive Technology (ACART).

Based on the information before me, I have formed the opinion that section 9(2)(h) of the Official Information Act 1982 (OIA) does not provide good reason to withhold the legal opinions by virtue of section 9(1). It is my opinion that the interest to be protected is, in this instance, outweighed by other public interest considerations favouring disclosure of the information. I have not formed that opinion lightly as, given the strength of the public interest in the maintenance of legal professional privilege, it will be rare for other public interest considerations to be seen as sufficiently strong to outweigh the need to maintain the privilege.

It is my recommendation that the Ministry release the legal opinions to Professor Farquhar.

## Role of Ombudsman

1. As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which a Minister or agency subject to the OIA refuses to make official information available when requested. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused.

## Background

2. Health researcher Professor Cindy Farquhar is Professor of Obstetrics and Gynaecology at the University of Auckland and a practising obstetrician and gynaecologist.
3. In August 2013, Ms Sarah Lensen (a PhD candidate) and Professor Farquhar designed a study protocol for a 'randomised clinical trial in fertility treatments' known as the DOT study.
4. The DOT study proposes that embryos created as part of an in-vitro fertilisation process will be randomly selected at day 3 and transferred on either day 3 or day 5 to a woman hoping to achieve a successful pregnancy. Professor Farquhar explained:

*The DOT study was designed as the best clinical trial possible to compare day 3 and day 5 transfer. If successful, its results would allow fertility clinics and their patients to make better informed decisions on whether to opt for day 3 or day 5 transfer, which may improve the patient's chances of having a healthy baby following assisted reproduction.*

5. In September 2013, Professor Farquhar and Ms Lensen made enquiries about making an ethics application for the DOT study. The enquiry was referred to ECART.
6. ECART advised Professor Farquhar that it had received legal advice (in the form of a Health Legal opinion dated 27 November 2013) on her request and, based on that advice, it considered that the DOT study would involve 'use' of embryos.

Professor Farquhar submitted:

*ECART informed me that they obtained legal advice that the DOT study would involve 'use' of embryos and therefore constitute 'human reproductive research' under the Human Assisted Reproductive Technology Act (the HART Act).<sup>1</sup> ECART explained that the HART Act prohibits the conduct of human reproductive research without the continuing approval of ECART and ECART cannot give approval for human reproductive research unless the activity is consistent with relevant guidelines or advice issued by the ACART. However, because ACART has not issued any guidelines or advice on human*

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<sup>1</sup> The term 'human reproductive research' is defined in section 5 of the Human Assisted Reproductive Technology Act 2004 as: *research that uses or creates a human gamete, a human embryo, or a hybrid embryo.*

*reproductive research, ECART advised that it cannot approve any application to conduct human reproductive research.*

7. Professor Farquhar says that day 3 and day 5 transfers already have approval from ACART. This is standard practice in New Zealand fertility clinics and the DOT study will not alter any aspect of the day 3 or day 5 transfer procedures already approved by ACART:

*The fertility clinics' selection of day 3 or day 5 transfer is usually governed by the number of viable embryos present on day 3, among other things – it is not governed by any ACART approved procedure. The DOT study would randomise the fertility clinics' selection of day 3 or day 5 transfers for the research participants and measure their outcomes.*

8. In November 2013, Professor Farquhar was informed by the Ethics Committee Advisor for the Ministry that ECART had sought a second opinion from the Crown Law Office, dated 18 February 2014, on whether the DOT study would involve the 'use' of embryos. Professor Farquhar understands that the Crown Law opinion was given to ECART in February 2014.
9. Professor Farquhar is not privy to the content of the legal opinions or any other legal advice held by the Ministry. However, she says that when ECART received the legal advice from Crown Law, it refused her application to proceed with the DOT study. She explained:

*On 19 February 2014, I received an email from [the Ethics Committees Manager] for the Ministry of Health. [Her] email stated that the Ministry of Health had been clarifying the status of the DOT study under the HART Act and that 'the Ministry's final view is that your study falls within the definition of 'human reproductive research' due to the fact that it will use embryos'. The email further stated that, as a result, the only option open to ECART was to refuse my application and refer it to ACART.*

## The request

10. On 28 February 2014, Professor Farquhar requested the following information from the Ministry:

*... I request all information of whatsoever nature that the Ministry of Health obtained, considered or had regard to in forming its final view that your study falls within the definition of 'human reproductive research' due to the fact that it will use embryos.*

11. The Ministry released information to Professor Farquhar. However, it relied on section 9(2)(h) of the OIA to withhold legal advice held by the Ministry, namely the legal opinions, in order to maintain legal professional privilege.

## Complaint

12. In April 2014, Professor Farquhar complained to the Ombudsman about the decision made by the Ministry to withhold the legal opinions:

*I understand that such advice may be legally privileged, however, even if this is so, it is my contention that in this particular case, the interest in withholding the privileged material is outweighed by other considerations which render it desirable, in the public interest, to make that information available.*

### Submission in support of complaint

13. Professor Farquhar provided the following submission in support of her complaint:

#### ***Considerations Favouring Disclosure of the Legally Privileged Material***

*There is a considerable interest from fertility clinics and couples with fertility delay in carrying out this clinical research into the comparative efficacy of day 3 and day 5 transfer. Up to 20% of New Zealanders will experience infertility at some point in their lives and many women will seek fertility treatment in the form of assisted reproduction. They will use either day 3 or day 5 transfer. However, there has been no study comparing the cumulative live birth rate for these procedures. This type of study might best indicate the chance of a woman having a healthy baby following assisted reproduction. Accordingly, a randomised controlled trial comparing day 3 and day 5 transfer was prioritised as one of the top ten studies to be completed at the Harbin Consensus Conference on Infertility Trials (24-26 August 2013). The DOT study was designed as the best clinical trial possible to compare day 3 and day 5 transfer. If successful, its results would allow fertility clinics and their patients to make better informed decisions on whether to opt for day 3 or day 5 transfer, which may improve the patient's chances of having a healthy baby following assisted reproduction.*

*As already stated, the Ministry of Health has received legal advice, including advice from the Crown Law Office that the DOT study would involve 'use' of embryos and constitute 'human reproductive research', which cannot be conducted without ECART's continuing approval of the research, which ECART cannot give without ACART issuing relevant guidelines. ACART can only issue relevant guidelines with the approval of the Minister of Health. The process would involve ACART taking an estimated 18 months to provide advice to the Minister, the Minister deciding whether or not ACART can develop and issue guidelines to ECART, and, if the Minister decides to permit ACART to do so, ACART then has to develop and issue the guidelines. However, past Ministers and the current Minister have not agreed to ACART developing guidelines that would enable human reproductive research. This means that, in practice, the effect of the Ministry of Health's decision that the DOT study involves the 'use'*

*of embryos amounts to a decision that this research cannot be undertaken in New Zealand. The effect of this is that we can carry out in-vitro fertilisation ('IVF') procedures, but we cannot conduct the most rigorous method of scientific research (randomised controlled trials) into their efficacy. To my mind this is an unacceptable situation.*

*The disclosure of the legal advice received by the Ministry would give me – and the New Zealand human fertility research community at large – certainty on how the Ministry would classify human fertility research proposals under the HART Act. This could potentially enable me to amend the DOT study to be the best possible study into the comparative efficacy of day 3 and day 5 transfer that would fall outside the Ministry's interpretation of 'human reproductive research'. This certainty would also permit other researchers to design studies to determine the efficacy of existing human fertility procedures with confidence that they would not be effectively prohibited as 'human reproductive research'. Disclosure of all the legal advice relied on by the Ministry of Health in reaching its decision to classify the DOT study as 'human reproductive research', would facilitate research that would be of considerable public benefit. I strongly believe that the public interest in improving fertility patient outcomes outweighs the interest in maintaining legal privilege in the circumstances of this particular case.*

*At this point in time I do not know how the Ministry of Health interprets 'use' in the definition of 'human reproductive research'. This information is clearly contained, however, in the legal advice received by the Ministry. I do not believe that a public body responsible for determining applications for research of public benefit should make a decision in reliance on a secret interpretation of its governing legislation. I understand that the public interest in maintaining a claim of legal privilege is normally very high, but it must be lower than usual when the privilege would operate to shield a public body from effective oversight.*

*I strongly believe that it would be in the public interest to carry out the DOT study as originally proposed. This may be possible if the legal advice that the study constitutes 'human reproductive research' is based on an erroneous understanding of the research methodology. It is not possible for me to check whether the legal advisors correctly understood the study proposal, and thus reached the correct conclusion on whether it should be classified as 'human reproductive research', without the Ministry making the legal advice available to me.*

## Investigation

14. On 21 July 2014, the Ministry was notified of the complaint and was asked to provide a copy of the information and a report explaining its decision to withhold the information under section 9(2)(h).
15. On 21 August 2014, the Ministry provided a report setting out its reasons for refusing the request (Ministry's response). However, the Ministry did not provide copies of the legal opinions until 16 December 2014 (the Crown Law opinion) and 2 March 2015 (Health Legal opinion), respectively, after further requests.
16. On 10 October 2014, with the consent of the Ministry, Professor Farquhar was invited to review the Ministry's response.
17. On 21 November 2014, Professor Farquhar commented on the Ministry's response.
18. In January 2015, the Ministry was asked whether it would be prepared to make a conditional release of the legal opinions under section 28(1)(c) of the OIA to Professor Farquhar and her research team. The Ministry said it was not prepared to do so. Its reasons included the fact that it considered it had already released a summary of the relevant information (in an email to Professor Farquhar dated 19 February 2014) and that it wished to maintain its independence to provide advice without undue pressure being applied.
19. In April 2015, after considering the information at issue, Professor Farquhar's submissions, the Ministry's reasons for withholding the legal opinions, and other relevant material, Dame Beverley formed a provisional opinion. She advised the Ministry and invited its comment.
20. On 7 May 2015, Crown Law, on behalf of the Ministry responded to the provisional opinion.
21. Regrettably, no further progress was made by the time Dame Beverley Wakem ceased to hold office in December 2015. I have now assumed responsibility for the investigation of this complaint and have reviewed all material relevant to the investigation. Having considered all of the issues raised, I have formed a final opinion.

## Comments received during investigation

### Comments from the Ministry

22. In response to the notification of the complaint, the Ministry acknowledged the following public interest considerations in release of the information:
  - a. *interest in knowing the legal basis upon which the Ministry relies for its decision on referring studies involving human reproductive research or assisted reproductive procedure to ECART;*

- b. *transparency and allowing the public to hold the Ministry accountable if not acting in accordance with legislation; and*
  - c. *clarifying the legal position of this study in New Zealand.*
23. However, the Ministry contended that any public interest in release of the legal opinions had been met in light of information provided to Professor Farquhar in an email dated 19 February 2014. That email stated:

*The Ministry's final view is that your study falls within the definition of 'human reproductive research' due to the fact that it will use embryos. This does not mean that the research is prohibited, rather that it needs to be regulated by guidelines issued by ACART. As you are aware, there are no guidelines on this matter at present. Therefore the only option open to ECART is to refuse to approve your application and refer it to ACART.*

The Ministry considered that, having told Professor Farquhar that the conclusion of the legal opinions was that the study would 'use' embryos, the 'legal basis' for ECART's decision had been provided.

24. With the Ministry's consent, Professor Farquhar was invited to review extracts from the Ministry's response and, in reply, she made a further comprehensive submission. Professor Farquhar disagreed that disclosure of the broad legal basis for their decision had met the public interest. The main points of this submission can be summarised as follows:
- a. the results of the DOT study would allow fertility clinics and patients to make better informed decisions on whether to opt for day 3 or day 5 transfer which may improve the chances of having a healthy baby following assisted reproduction;
  - b. there is a strong public interest in this research to improve public health;
  - c. the result of the Ministry's decision that the DOT study will involve the 'use' of embryos, based on the legal opinions, is that the research cannot currently take place in New Zealand;
  - d. Disclosure of the legal opinions would promote the public interest because:
    - i. Professor Farquhar and the wider human fertility research community in New Zealand would have certainty about how 'uses' is interpreted, for the purposes of the HART Act. This will potentially allow the DOT study to be modified. Without this information, it is not possible to know whether and how it could be altered to ensure ethics approval is obtained. It would also enable other researchers to ensure they do not design studies that involve 'use' of embryos. Developing such studies takes a considerable amount of work which is wasted if the study is not approved. To avoid this waste, researchers are less likely to submit proposals that might be deemed to 'use'

embryos, to the detriment of the health of women undergoing assisted reproduction procedures.

- ii. Without the legal opinions, Professor Farquhar could not determine whether the advice may have been based on an erroneous understanding of the research methodology. Withholding the advice shields the Ministry's decision from effective scrutiny.
- iii. The interest in maintaining legal professional privilege here is weaker than in other cases - if judicially reviewed, the Ministry would have to expose their legal reasoning to the Court. It is in the public interest for Professor Farquhar to see the legal opinions to determine whether litigation is necessary or desirable - if the reasoning is sound and admits no credible alternative interpretations of the 'use' of embryos in the definition of *'human reproductive research'* then there would be no merit in seeking judicial review. It is in the public interest to avoid the costs of unnecessary litigation. If the legal reasoning were not so convincing, then the result of any litigation would be in the public interest.

## Provisional opinion

25. Having considered these submissions, Dame Beverley formed the provisional opinion that:

### Section 9(2)(h)

- a. Section 9(2)(h) of the OIA applies and it was open to the Ministry to withhold the legal opinions for the maintenance of legal professional privilege.

### Section 9(1)

- b. Section 9(1) of the OIA applies. In the context of this case, the public interest in the transparency and accountability of the Ministry as the statutory and regulatory decision maker overrides the public interest in the maintenance of legal professional privilege:
  - i. in order to outweigh the public interest in maintaining legal professional privilege, a corresponding greater public interest must be seen as better served by the disclosure of the protected information;
  - ii. the corresponding public interest to be considered under section 9(1) of the OIA is the public interest in transparency and accountability of statutory decision makers;

- iii. it must be an exceptional case if the public interest in transparency and accountability of statutory decision makers is to outweigh the very high public interest in the maintenance of legal professional privilege;<sup>2</sup> and
  - c. the decision not to release the legal opinions is an exceptional case for the following reasons:
    - i. the legal advice was specifically sought to assist the Ministry to interpret the meaning of an important but undefined statutory term in the HART Act;
    - ii. the Ministry relied on the advice when it made the decision that the DOT study 'uses' embryos. Its decision on the interpretation of the term 'uses' has a direct impact on research designed to improve positive outcomes for couples dealing with fertility issues in New Zealand; and
    - iii. the role of a regulatory authority such as the Ministry, ECART and ACART is to help not hinder the delivery of health care to the public – it is vital that researchers in that field of expertise have an understanding of why the regulatory agency is interpreting the law in a certain way.
26. Dame Beverley provisionally considered that the Ministry should release the legal opinions or a high level summary of the legal opinions.

## Comments from Crown Law on provisional opinion

27. In its response of 7 May 2015, Crown Law disagreed. Crown Law's view in short, is:
- a. there is nothing exceptional in the government seeking (and being provided with) legal advice on the interpretation of legislative provisions that it is operating on a regular basis;
  - b. as recently as October 2014, Ombudsman Ron Paterson<sup>3</sup> agreed [with Crown Law's view]. That is:
    - i. when section 9(2)(h) of the OIA applies to the information at issue, a summary of reasons for a decision is sufficient to satisfy the overriding public interest recognised by s9(1). The recommended summary of reasons in the provisional opinion would effectively release the legal advice in its entirety; and

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<sup>2</sup> Opinion under the Official Information Act 1982, Ombudsman Ron Paterson, July 2014: *Request for legal advice concerning outsourcing contact with taxpayers* (reference 339486) at page 38.

<sup>3</sup> Opinion under the Official Information Act 1982, of Ombudsman Ron Paterson, October 2014: *Request for information concerning Police decision not to lay charge of manslaughter following death from careless discharge of firearm* (reference 340832).

- ii. the Ministry has already provided Professor Farquhar with an explanation of the grounds that ECART relied on to make a decision that the DOT study ‘uses’ embryos.
  - c. the fact that Professor Farquhar has a different perspective is not exceptional – it is open to her to obtain independent legal advice, and if appropriate seek judicial review;
  - d. the effect of the interpretation of legislation by a decision-maker on a section of the public is not a relevant factor when considering the issue of access to information. It may be relevant when determining the legal rights of parties to litigation, but it is outside the scope of the OIA;
  - e. the fact that the legislation results in one outcome over another does not alter the application of the law to that decision making process.<sup>4</sup> Crown Law explained:

*In other words, the legislation cannot be interpreted in such a way that results in a “fair” outcome of a particular situation. Considerations of “fairness” around the outcome of the decision are not relevant to the consideration of access to official information. The responsibility of statutory decision-makers is to apply law as Parliament intended it.*
  - f. the Ombudsman’s jurisdiction under the OIA is to consider the release of the information sought, not the merits of the decision that the information relates to.
28. Notwithstanding the fact that Crown Law disagreed with the findings in the provisional opinion, it helpfully suggested that a way forward would be for the Ministry, in consultation with ECART, to prepare ‘guidance’ as to what type of research proposals are likely to be considered ‘human reproductive research’ due to the proposed ‘use’ of embryos. Crown Law suggested that:

*This guidance document would serve to increase the transparency of the decision-making process and to promote the accountability of ECART for their decisions, satisfying the public interest considerations under s9(1) of the OIA and appropriately reflecting the balance between:*

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<sup>4</sup> In support of this submission Crown Law referred me to an Opinion of Ombudsman David McGee, 31 January 2013: *Requests for information regarding the production of ‘The Hobbit’ and film production generally (reference 302561 and 302600)*. I do not intend to comment on this aspect of Crown Law’s response, or its submission on the impact of Dr McGee’s opinion in the *Hobbit* case. I am not persuaded by Crown Law’s premise that the reasoning in the provisional opinion allows for a conclusion (or even an inference) that considerations of ‘fairness’ about the outcome are not relevant considerations when making a decision about the access of information under the OIA. To say that ‘considerations of ‘fairness’ around the outcome of the decision are not relevant to the consideration of access to official information’ overlooks the argument that fairness can, in certain circumstances, encompass the ability of individual New Zealanders to have access to official information to more effectively participate in the making and administration of laws and policies.

- (a) *The interest in maintaining professional privilege; and*
- (b) *The public interest in ECART providing an appropriate explanation of their decision and reasoning.*

## Analysis and findings

### Discussion

29. I have read both legal opinions relied on by ECART to decline Professor Farquhar's application to proceed with the DOT study. Professor Farquhar disagrees with the conclusion reached in the legal opinions that her study will 'use' embryos. Her position is that ACART has already approved day 3 and day 5 transfers of embryos and the DOT study will not alter any aspect of the approved procedures.
30. The issue is a very fine one, namely whether the DOT study proposal 'uses' embryos. The relevance of that is, if that is the position, then Professor Farquhar must obtain permission from ACART before proceeding with the DOT study. On request the Ministry refused to release the legal opinions to Professor Farquhar under section 9(2)(h) of the OIA.
31. The OIA provides good reason for withholding official information if:
  - a. the withholding of the information is necessary to '*maintain legal professional privilege*' (section 9(2)(h) of the OIA); and
  - b. this interest is not '*outweighed by other considerations which render it desirable, in the public interest, to make that information available*' (section 9(1) of the OIA).

Both of these elements must be satisfied before section 9(2)(h) of the OIA provides a good reason for refusing a request.

32. It is common ground that legal professional privilege applies to both legal opinions .
33. I am not required to form an opinion on the correctness of the legal advice proffered by Crown Law and Health Legal. I am merely asked to form an opinion on whether the public interest in the legal advice overrides the public interest in the maintenance of legal professional privilege.

## Section 9(1) of the OIA – public interest

34. In her provisional opinion Dame Beverley recounted the following excerpt from Ombudsman Ron Paterson’s opinion published in July 2014 (July 2014 Ombudsman’s opinion):<sup>5</sup>

*The strength of legal professional privilege has often been recognised by the courts and its principles are well settled. Glazebrook J, in delivering the judgment of the Court of Appeal in Shannon v Shannon<sup>6</sup> referred to the Privy Council’s advice in B v Auckland District Law Society<sup>7</sup> and stated:<sup>8</sup>*

*‘[36] ... legal professional privilege is more than an ordinary rule of evidence. It is a fundamental condition on which the administration of justice as a whole rests and is not for the benefit of any particular client but in the wider interests of all those who might otherwise be deterred from telling the whole truth to their solicitors.*

*[37] The Privy Council rejected any suggestion that there should be a balancing exercise when considering the admissibility of privileged material ... legal profession privilege is itself the product of a balancing exercise between public interests whereby, subject to the well-recognised crime or fraud exception, the public interest in the perfect administration of justice is accorded paramountcy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant evidence. ... The rationale is that a lawyer has to be able to give a client an absolute and unqualified assurance that whatever a client reveals in confidence will never be disclosed without the client’s consent. Such an assurance is inconsistent with the existence of a balancing exercise.’*

*Whether the legal opinions were internal or external legal opinions makes no difference to the strength of the public interest in the maintenance of legal professional privilege.*

The Ministry also referred to the July 2014 Ombudsman’s opinion in its response to notification of this investigation.

35. Consequently, in order to outweigh the public interest in maintaining professional legal privilege, a corresponding greater public interest must be seen as better served by the disclosure of the protected information.

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<sup>5</sup> Opinion under the Official Information Act 1982, of Ombudsman Ron Paterson, July 2014: *Request for legal advice concerning outsourcing contact with taxpayers* (reference 339486).

<sup>6</sup> [2005] 3 NZLR 757.

<sup>7</sup> [2004] 1 NZLR 326.

<sup>8</sup> *Supra* at 766.

36. Professor Paterson opined:

*In considering whether the section 9(1) override applies, I have taken into account that members of the public may well be interested in knowing the overall tenor of legal advice provided by government agencies subject to the OIA. There may be exceptional cases where, for transparency and accountability of statutory decision makers, the public interest supports disclosure of a high level summary of legal advice. That might be the case in relation to a high profile decision of the Crown not to lay criminal charges.*

37. Dame Beverley was satisfied that this case was an exceptional case whereby the public interest in the transparency and accountability of the Ministry as the statutory and regulatory decision maker outweighed the public interest in legal professional privilege.

38. I agree with Dame Beverley's finding that section 9(1) of the OIA applies in this case, but for different reasons.

39. Before I explain my reasoning, let me say at the outset that the public interest in the maintenance of legal professional privilege will only ever be outweighed where a greater public interest in disclosure is demonstrably clear. In other words, although the very high public interest in legal professional privilege is well recognised, under the OIA, it is not absolute. Parliament chose to provide protection for the maintenance of legal professional privilege in section 9 rather than section 6 of the OIA. Section 6 reasons for refusal are conclusive and not subject to a countervailing public interest test. By deciding to make the maintenance of legal professional privilege subject to section 9(1), Parliament expressly signalled that there will be occasions where the public interest in the disclosure of the legal advice outweighs legal professional privilege.

40. My opinion does not focus on whether this is an exceptional case. Instead, I have considered the purpose for which the opinions were sought, and supplied, that is their context, their contents, and the use to which they have been put.

41. This follows the general principle of legal professional privilege – that every application of professional legal privilege must depend on the facts of the case and the context in which the legal advice was sought. There will be occasions, such as in an individual contentious situation where litigation is imminent, when the privilege is so sensitive and important for the maintenance of confidence and trust that the maintenance of the privilege will always outweigh an alternative public interest. There will be other occasions where a legal opinion is a statement of the law, rather than legal advice on particular facts in a sensitive context.

42. Here the purpose of the legal opinions was to provide advice to a regulatory agency on the interpretation of a statutory term. Crown Law responded that this type of advice was unexceptional, stating that *'[t]he government seeks and is provided with legal advice on the interpretation of legislative provisions that it is operating under on a regular basis.'*

43. I agree that the requests for legal advice were unremarkable. This is reflected in the content of the legal opinions where the authors summarise the law and seek to interpret it. In that respect the legal opinions are akin to judgments of the Court.

44. I therefore see nothing in release of the legal opinions in the context of this case which might demonstrably compromise legal professional privilege outside that context or which leads me to the view that the Ministry would be compromised, embarrassed or prejudiced.
45. I am not suggesting that legal professional privilege does not apply. That is accepted. What I am saying is that the context in which it arises is relevant when considering, under section 9(1), the public interest in the release of the privileged information.
46. I am persuaded that the competing public interest in this complaint does override the need to maintain legal professional privilege which would otherwise provide good reason for withholding the information under section 9(2)(h).
47. The research being conducted by Professor Farquhar and other researchers in her field is a matter of considerable public importance and interest. It seems to me that it is incumbent on the Ministry to do everything it can to assist researchers adopt correct procedures and to ensure that the best first hand information is made available. I can think of no plausible reason why the Ministry would seek to withhold from a senior health researcher advice, whether privileged legal advice or not, about the interpretation of a crucial term in the governing legislation.

### **Further comments by Crown Law**

48. In its response to the provisional opinion Crown Law made two submissions that I wish to address:
  - a. statutory decision makers should not be expected to provide access to legal advice to assist a requester to challenge a decision; and
  - b. in October 2014, the Office of the Ombudsman agreed that when section 9(2)(h) applies, a summary of reasons for a decision is sufficient to satisfy an overriding public interest under section 9(1).

### **Provision of legal advice to assist a requester to challenge a decision**

49. Crown Law submitted that it not appropriate to expect a statutory decision maker to provide access to legal advice to assist an affected person or agency challenge a decision. In this complaint, Crown Law stated that a summary of reasons would be adequate. I was referred to comments made by Ombudsman Ron Paterson in the October 2014 Opinion.<sup>9</sup> I am very conscious of the remarks made in that case and of the point Crown Law is seeking to make. But each case must turn on its own facts and in this case my view is that it is the legal opinions themselves which should be disclosed.

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<sup>9</sup> Refer to footnote 3.

50. Statutory decision makers may not be expected to provide access to legal advice to assist a requester to challenge a decision but, consistent with the purpose set out in section 4(a) of the OIA, they are expected to make available official information to the people of New Zealand in order—
- i. *to enable their more effective participation in the making and administration of laws and policies; and*
  - ii. *to promote the accountability of Ministers of the Crown and officials,—  
and thereby to enhance respect for the law and to promote the good government of New Zealand.*

Disclosure of the opinions at issue would enable citizens such as New Zealand human fertility researchers and fertility clinic patients to more effectively participate in the administration of the HART Act and any policy guidelines developed by ACART which impact significantly on them. Disclosure would also promote the accountability of officials. Although statutory decision makers are not required to justify their decisions under the OIA (other than their obligations under section 19) the scheme and purposes of the OIA clearly envisage decision makers disclosing sufficient information to adequately explain the basis for decisions that impact on individual New Zealanders to promote their accountability.

51. Professor Farquhar's request seeks to understand why officials have found the DOT study would involve 'use' of embryos and therefore constitute 'human reproductive research' under the HART Act. This turns on the interpretation the Ministry has adopted, following receipt of the legal opinions, of the statutory term 'use' referred to in section 5 of the HART Act. Disclosure of the legal opinions adopted by the Ministry in this case would promote the accountability of the statutory decision maker, enable more effective participation by concerned or affected citizens in the administration of the HART Act and the making of policies by ACART and thereby enhance respect for the law and to promote the good government of New Zealand.

## Summary of reasons

52. Crown Law made the following submission:

*As recently as October 2014, the Office of the Ombudsman has agreed that when s9(2)(h) of the OIA applies to the information at issue, a summary of reasons for a decision is sufficient to satisfy the overriding public interest recognised by s9(1) of the OIA.<sup>10</sup>*

53. That is a bold claim to make. While Professor Paterson considered that a summary of reasons for a decision may be sufficient to satisfying the section 9(1) public interest, he did not conclude that that would always be the case. In fact the October 2014

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<sup>10</sup> Refer to footnote 3.

Ombudsman's opinion exemplifies why it is important to consider the purpose for which the legal opinion was sought, and supplied and the content of the legal opinion. The purpose for and content of the legal opinion that Professor Paterson was considering were materially different to the context of and content of the legal opinions in this complaint. In that complaint the complainant requested a legal opinion held by the Police. The purpose of the opinion, and the reason it was sought, was to advise the Police how to lay charges against a particular individual. This complaint involves legal advice clarifying the interpretation of a term in a regulatory statute. The two are quite different.

### Proposal to prepare guidance

54. What was suggested is that ECART, in consultation with the Ministry, would prepare guidance as to what type of research proposals are likely to be considered '*human reproductive research*'. While I do not want to dissuade agencies from suggesting a way forward to resolve a complaint, in this instance I am not persuaded that the proposed guidance would be adequate. To meet the section 9(1) public interest identified in this complaint, consultation with health researchers also needs to occur. Further, if the guidance is to be **adequate** it will be necessary to include the level of detail contained in the legal opinions. Crown Law has already indicated that a summary of reasons with that level of detail is not acceptable.

### Ombudsman's opinion

55. In my opinion, for the reasons set out above, section 9(2)(h) of the OIA does not provide good reason to withhold the legal opinions by virtue of section 9(1). It is my opinion that that withholding ground is outweighed by other public interest considerations favouring disclosure of the information.

### Recommendation

56. It is my recommendation that the Ministry release the following information to Professor Farquhar:
- a. Crown Law opinion dated 18 February 2014; and
  - b. Health Legal opinion dated 27 November 2013.

Judge Peter Boshier  
Chief Ombudsman

## Appendix 1: Relevant statutory provisions

### Official Information Act 1982

#### 4. Purposes

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

- (a) to increase progressively the availability of official information to the people of New Zealand in order—
  - (i) to enable their more effective participation in the making and administration of laws and policies; and
  - (ii) to promote the accountability of Ministers of the Crown and officials,—  
and thereby to enhance respect for the law and to promote the good government of New Zealand:
- (b) to provide for proper access by each person to official information relating to that person:
- (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

#### 9. Other reasons for withholding official information

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
- (2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—
  - (a) protect the privacy of natural persons, including that of deceased natural persons; or
  - (b) protect information where the making available of the information—
    - (i) would disclose a trade secret; or
    - (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or
  - (ba) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, 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; or
- (c) avoid prejudice to measures protecting the health or safety of members of the public; or
- (d) avoid prejudice to the substantial economic interests of New Zealand; or
- (e) avoid prejudice to measures that prevent or mitigate material loss to members of the public; or
- (f) maintain the constitutional conventions for the time being which protect—
  - (i) the confidentiality of communications by or with the Sovereign or her representative:
  - (ii) collective and individual ministerial responsibility:
  - (iii) the political neutrality of officials:
  - (iv) the confidentiality of advice tendered by Ministers of the Crown and officials; or
- (g) maintain the effective conduct of public affairs through—
  - (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; or
  - (ii) the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment; or
- (h) maintain legal professional privilege; or
- (i) enable a Minister of the Crown or any department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities; or
- (j) enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations); or
- (k) prevent the disclosure or use of official information for improper gain or improper advantage

## **Human Assisted Reproductive Technology Act 2004**

### **5 Interpretation**

In this Act, unless the context otherwise requires,

**human reproductive research** means research that uses or creates a human gamete, a human embryo, or a hybrid embryo

**16 Assisted reproductive procedures and human reproductive research only to proceed with prior approval**

- (1) Every person commits an offence who performs an assisted reproductive procedure or conducts human reproductive research without the prior approval in writing of the ethics committee.
- (2) Every person who commits an offence against subsection (1) is liable on conviction to a fine not exceeding \$50,000.