

Request for information relating to Bureau of Meteorology of Australia peer-review of National Institute of Water and Atmospheric Research report on ‘Seven-Station Temperature Series’

Ombudsman’s Opinion

Legislation:	Official Information Act 1982, s 9(1) and 9(2)(ba)(i) (see appendix for full text)
Agency:	National Institute of Water and Atmospheric Research
Request for:	Information relating to peer review by the Australian Bureau of Meteorology of ‘Seven-Station Temperature Series’ data analysis of temperature trends
Ombudsman:	Dame Beverley Wakem
Reference number:	304458
Date:	November 2015

Contents

Summary	2
My role	2
Background	2
Request for information	2
The complaint	4
Investigation	5
Analysis and findings	6
Information at issue.....	6
Section 9(2)(ba)(i) Official Information Act 1982	6
Australian Acting Information Commissioner’s decision	10
Findings on section 9(2)(ba)(i)	12
Section 9(1) Official Information Act 1982: public interest	15
Chief Ombudsman’s opinion	16
Appendix : Relevant statutory provisions	17

Summary

The complainant made requests to the National Institute of Water and Atmospheric Research (NIWA) for information it held relating to communications between NIWA and the Bureau of Meteorology (Australia) (BoM) concerning the peer review by BoM of information forming the basis for NIWA's 'Report on the Review of NIWA's 'Seven-Station' Temperature Series' data published on 16 December 2010. The report reviewed New Zealand temperature trends from seven different locations. NIWA refused the requests under section 9(2)(ba)(i) of the Official Information Act 1982 (OIA) on the basis the information at issue was subject to an obligation of confidence; its release would prejudice the future supply of similar information; and it was in the public interest that such information should continue to be supplied. (NIWA also relied on other "good reasons" found in section 9(2) to withhold that information.)

I formed the opinion that section 9(2)(ba)(i) provided good reason to refuse the request. In forming my opinion, I took into account the importance of upholding a longstanding and widely accepted scientific convention. Under this convention scientists peer review information provided in confidence by other scientists. NIWA provided the information at issue to BoM for that purpose. Such peer-reviewing contributes to the credibility of scientific research.

My role

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. NIWA is subject to the OIA. My role in undertaking an investigation is to form an independent opinion on whether the requests were properly refused.

Background

Request for information

2. In January 2011, the complainant wrote to NIWA and requested the following information (the first request):

"All electronic or paper communications relating in any way to the Review project (including but not limited to faxes, emails, reports, papers, documents, letters, memos and texts) that passed between NIWA and BoM during the period from 1 September, 2010, to 18 December, 2010."

3. NIWA is a crown research institute established for the purposes of undertaking research pursuant to the Crown Research Institutes Act 1992. Its primary area of research is in relation to environmental matters. It also advises the Crown on scientific issues relating to climate change.

4. In February 2011, NIWA refused the complainant's first request and stated:

- "1. The correspondence between NIWA and the Australian Bureau of Meteorology consisted of inter-scientist communications relating to the conduct of a peer review, and was conducted on a confidential basis. The expectation of the correspondents was that the contents would not be disclosed;*
- 2. The purpose of the correspondence was to enable a free and frank exchange of opinions leading to appropriate modification of a draft scientific report prior to its publication. This report is the 'Review' by NIWA of its 'Seven-Station' temperature series to which you refer. The correspondence was part of a peer review process conducted during the course of each party's duties. To disclose such correspondence would stymie the flow of similar information, negatively affect the ability of NIWA and the Bureau of Meteorology to conduct such peer reviews, and negatively affect the ability of NIWA to have draft papers peer reviewed prior to publication. This would be prejudicial to the public interest. It is in the public interest that information and papers published by NIWA are accurate and to a high scientific standard. Peer review, an essential part of the scientific process, assists with maintaining such standards; and*
- 3. The correspondence you seek is the subject of legal privilege as the review, and correspondence with the Bureau, is directly relevant to the judicial review proceedings filed by the New Zealand Climate Science Education Trust.*

NIWA has considered the reasons which would support disclosure of that correspondence, but believes that the balance favours non-disclosure of the information you seek.

Irrespective of the legal privilege ground, the confidentiality of the peer review process is a long standing, and widely accepted, convention. That convention forms an essential aspect of, and is paramount to, the success of the scientific process and method. To breach this convention would weaken the ability of scientists to undertake thorough, frank and potentially critical reviews of draft papers, thereby decreasing the rigour with which draft papers are examined.

Peer reviewers review papers critically and objectively and make suggestions for improvements before publication. Peer review is part of a due process which provides objectivity to scientific papers and minimises the possibility of personal bias. It is in the public interest that a robust examination of draft scientific papers, by suitably qualified scientific experts, occurs. This ensures that the hypotheses and results contained therein are thoroughly tested; so the public can be confident of the scientific principles and results conveyed.

NIWA believes that, in this instance, the public interest lies in withholding the information, thereby maintaining the confidentiality of the scientific peer review

process, enabling free and frank discussions to occur and upholding legal privilege, rather than in disclosure of the information you seek.”

5. In May 2011 the complainant requested NIWA to provide the following information (the second request):

“all exchanges (being letters, email, faxes, attachments, enclosures, reports or other documents) which occurred between NIWA and the BoM during the period 18 December 2010 to 18 May 2011, inclusive. In particular, my request includes the 15 documents addressed by NIWA to the BoM (numbered 142-9 and 155-61) and shown in the BoM’s schedule.”

(The document referred to as “the BoM’s schedule” is a schedule of documents provided for the purpose of discovery in a High Court proceeding.¹)

6. In July 2011, NIWA refused the second request, in essence for the same reasons it refused the first request.

The complaint

7. In February 2011, the complainant complained to this Office about NIWA’s withholding of the information described in the first request.

8. In the letter of complaint, the complainant commented:

“There does not appear to be any dispute that the requested documents comprise ‘official information’ in terms of the Act. Rather, NIWA’s refusal appears to be made under Section 18(b) and presumably relies upon one or more of the grounds described in Section 9.

Although NIWA’s formal response is not specific, the wording suggests reliance upon paragraph (2)(ba) [of section 9], which applies ‘if, and only if, the withholding of information is necessary to ... protect information which is subject to an obligation of confidence ... where the making available of the information 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’.

First, NIWA does not go so far as to claim that its correspondence with the Bureau of Meteorology (BoM) was ‘subject to an obligation of confidence’, simply observing that the parties did not expect the contents to be disclosed. The Act says nothing about mere expectations and the statutory requirement is not met.

¹ *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* CIV-2010-404-005092; High Court, Auckland, Venning J (7 September 2012); [2013] 1 NZLR 75.

Secondly, the correspondence in question arose in the course of a commercial consultancy project, whereby NIWA briefed the Bureau to undertake a defined low-quality audit of a proposed climate report—which was eventually published on 17 December 2010.

NIWA has paid for the information being sought, using public funds. There is no reason to believe that the Bureau would decline to undertake further fee-earning projects if its advices were disclosed [the BoM is itself subject to Freedom of Information statutes].

The fact that frank and free exchanges of opinion occurred has no relevance. Nor does the observation that the process was conducted in the course of duty of the parties.

This is a very different situation from scientific ‘independent peer review’. That term d’art applies to the action initiated by editors of learned scientific journals considering manuscripts submitted for publication. Editors traditionally request two or more expert commentators to advise the editor on whether the submitted paper is worthy of publication in the journal. The author(s) of the paper have no say in the selection, and may never know who was involved or what was said.

In the instant case, NIWA approached the Bureau and negotiated a commercial contract for services, which thereafter governed the relationship. No outside parties were involved, and no party was ‘independent’. The term d’art has no application.

Finally, there is no merit in the allegation that legal professional privilege attaches to the report or the correspondence under paragraph 9(2)(h) of the Act. The contract between NIWA and the BoM was not undertaken in contemplation of legal proceedings.”

9. The complainant subsequently complained to this Office about NIWA's withholding of the information in the second request.

Investigation

10. In April 2011, this Office notified NIWA of the complaint relating to NIWA's withholding of the information described in the first request and requested copies of the information at issue.
11. On receipt of the complaint relating to the second request, I expanded my investigation to include the information described in the second request and notified NIWA accordingly.
12. In May 2011 and July 2012, NIWA provided reports and copies of the information at issue. It supplemented these reports in a report in July 2014.

13. In October 2014, I provided to the complainant and NIWA a copy of my provisional opinion.
14. In November 2014, the complainant provided comments on my provisional opinion.
15. In May 2015, NIWA provided comments on my provisional opinion.

Analysis and findings

Information at issue

16. In December 2010, NIWA released a report reviewing its ‘Seven-Station Temperature Series’. The report is entitled ‘Report on the Review of NIWA’s ‘Seven-Station Temperature Series’ (the 2010 report).

17. On its website² NIWA describes the ‘Seven-Station Temperature Series’ as follows:

“The seven-station series is an analysis of temperature trends from climate station data at seven locations which are geographically representative of the country, and for which there is a long time series of climate records (over 100 years): Auckland, Wellington, Masterton, Nelson, Hokitika, Lincoln (near Christchurch), and Dunedin.

The concept of the seven-station temperature series was originally developed by Dr Jim Salinger in 1981. He recognised that, although the absolute temperatures varied markedly from point to point across the New Zealand landscape, the variations from year to year were much more uniform, and only a few locations were actually required to form a robust estimate of the national temperature trend.

The seven-station series was revised and updated in 1992, and again in 2010.”

18. In 2010, NIWA requested BoM to undertake a peer review of the ‘Seven-Station Temperature Series’ which substantially formed the basis of the 2010 report.
19. The first and second requests relate to information passing between NIWA and BoM relating to BoM’s peer review.

Section 9(2)(ba)(i) Official Information Act 1982

20. Section 9(2)(ba)(i) provides “good reason” to withhold information—

“If, and only if, the withholding of the information is necessary to—

...

² www.niwa.co.nz

(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;”

21. Section 9(2)(ba)(i) is subject to section 9(1) which reads:

“(1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5 of this Act, 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.”

22. NIWA relied on section 9(2)(ba)(i) to withhold the information at issue, as well as the good reasons found in section 9(2)(ba)(ii) (confidentiality), 9(2)(g)(i) (free and frank expression of opinions), 9(2)(h) (maintenance of legal professional privilege), and 9(2)(i) (unreasonable prejudice to commercial position).³

23. In the light of the opinion I have formed with regard to NIWA’s reliance on section 9(2)(ba)(i) to withhold the information at issue, it is unnecessary for me to form an opinion on NIWA’s reliance on other grounds.

24. In withholding the information at issue, NIWA relied both on an explicit agreement between NIWA and BoM staff that the information at issue would be kept confidential and an implied obligation of confidence to that effect.

25. In respect of its reliance on an explicit agreement of confidentiality, NIWA referred this Office to a meeting between NIWA staff and a BoM staff member in September 2010. At that meeting, BoM agreed to undertake the peer review.

26. In a letter to this Office, NIWA stated:

“During this meeting it was agreed that both parties would supply information to the other, and the peer review would be undertaken on a confidential basis. It was agreed that the material relating to the peer review would not be released to any third party, unless the other party specifically approved any such disclosure. There was one specific exception, being the anticipated use in the judicial review proceedings, but otherwise the overarching convention relating to peer reviews would apply, namely material excluding the final version(s) would not be released.”

³ The text of these provisions is in the appendix.

27. NIWA did not release the information at issue in the judicial review proceeding.⁴

28. NIWA further stated:

“There is an implicit, long standing and widely accepted convention regarding the confidentiality of the scientific peer review process. As explained to [the complainant], this convention forms an essential aspect of, and is paramount to, the success of the scientific process and method.

Scientists undertake their research and collaborations in accordance with generally accepted and longstanding principles relating to their ability to have 'free and frank' discussions to robustly test a fellow scientist's proposed hypothesis. The principles and conventions which enable scientists to do so are that all communications, workings and working drafts of papers are held in confidence.

It is widely accepted that only the final versions of papers are made public, because by this time there has been an opportunity to thoroughly test a hypothesis, play 'devil's advocate' and 'openly' disagree with another scientist's work or opinions. If this testing and questioning was not able to occur or was restricted, the quality of research and scientific outputs and discoveries would suffer.

To breach this widely understood and accepted peer review practice would weaken the willingness and ability of scientists to undertake thorough, frank and potentially critical reviews of draft papers, thereby decreasing the rigour with which draft papers are examined.

An example illustrating this convention is that when a paper is being prepared for publication it is only circulated to peer reviewers on a confidential basis. Often those reviewers are made to execute non-disclosure agreements, although this level of formality is usually only required by the scientific publishing houses rather than scientists themselves.”

29. NIWA advises that none of the information at issue is in the public domain, except for one document. That document is a letter of 14 December 2010 from BoM to NIWA reproduced at p15 of the 2010 report.

30. In other words, NIWA contends that if it were to release the information at issue, it would breach a generally accepted and longstanding convention. Under this convention, scientists discuss freely and frankly, for example, a proposed hypothesis. That free and frank discussion of views in confidence between scientists enables them to test robustly and thoroughly a proposed hypothesis. NIWA contends it provided the information at issue to BoM (and BoM commented on that information) under an explicit agreement of confidentiality and in terms of that convention.

⁴ See footnote 1.

31. NIWA stated:

“From NIWA’s perspective it is significant that one of NIWA’s statutory principles of operation is to pursue excellence in all its activities (s5(1)(b) of the Crown Research Institutes Act 1992). NIWA’s ability to access and use the scientific peer review process through relationships with other science organisations is fundamental to the maintenance of standards of excellence in its research output.”

32. The ‘Seven-Station Temperature Series’ assists NIWA in its climate change research. Release of the information at issue would, in NIWA’s opinion, affect its good relationships with its international research partners in that field. NIWA stated:

“In a more tangible sense, NIWA uses third party (collaborator) intellectual property in its climate change research. For example, a number of climate models, which NIWA increasingly use in its climate change research, are third party models. If NIWA did not maintain a good working relationship with its research collaborators, NIWA’s access to that intellectual property, including models it uses in its research, could potentially be jeopardised, or at least restricted, and therefore NIWA’s ability to undertake its climate (and a proportion of its hazards) related research activities could be severely prejudiced. The relationships NIWA has with [its] research collaborators are particularly important as a number of its research contracts outputs require NIWA to publish a number of high quality research papers, particularly peer-reviewed papers.

The relationships NIWA has with its international collaborators are vital to enable NIWA to continue to produce and publish those papers, a significant number of which are written in collaboration with co-authors from scientific institutions in other countries. If the relationships with those collaborators broke down, the number of collaborations (including the number of visiting scientist interactions and the collaborations developed through discussions at international conferences) will decrease and therefore the number of papers NIWA is able to publish will also decrease. This will have a prejudicial effect on NIWA’s research, and therefore commercial, activities.”

33. As stated, NIWA published on its website the 2010 report, and it made available the original station reports and data used in the ‘Seven-Station Temperature Series’ to the public. In that way, NIWA stated:

“This allows members of the public to assess the veracity and validity of NIWA’s research and verify the scientific basis upon which policy decisions are made by the Crown and territorial authorities.”

Australian Acting Information Commissioner's decision

34. In a decision released on 18 April 2013,⁵ the Acting Freedom of Information Commissioner, Ms Toni Pirani, reviewed a decision by BoM to refuse to release to an “applicant” essentially the same information as the information at issue.
35. The Acting Commissioner affirmed BoM’s decision not to release the information requested in reliance on section 33(a)(iii) of the Freedom of Information Act 1982 (Cth) (FOI Act). That provision states:

“Documents affecting national security, defence or international relations

A document is an exempt document if disclosure of the document under this Act:

(a) Would, or could reasonably be expected to, cause damage to:

...

(iii) the international relations of the Commonwealth;”

36. At para 13 of her decision, the Acting Commissioner stated:

“The Australian Information Commissioner has issued Guidelines under s 93A of the FOI Act to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines state:

5.30 The phrase 'international relations' has been interpreted as meaning the ability of the Australian government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between government agencies.

5.31 The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible damage, such as loss of trust and confidence in the Australian Government or one of its agencies. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must also be real and substantial grounds for the conclusion that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.

5.32 For example, the disclosure of a document may diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or its agencies less willing to cooperate with Australian agencies in the future.”
(references omitted)

⁵ [2013] AICmr 46

37. It is apparent from the Acting Commissioner's decision, that, in essence, BoM made the same submissions to her as NIWA did to me in support of its contention that the information there at issue should not be released. The Acting Commissioner stated:

"24. The Bureau states that anonymity is an important characteristic of the peer review process. In agreeing to undertake a review of NIWA's 'Seven-station' temperature data series, the Bureau agreed to honour the long standing scientific convention that the review would be conducted in confidence and anonymously. The Bureau says that should the information sought by the applicant be released, this will damage the existing relationship between the Bureau and NIWA because NIWA will no longer trust the Bureau as the repository of confidential information. NIWA strongly objected to the release of this information when consulted by the Bureau in relation to this FOI request.

25. The Bureau states this loss of trust will affect its relationships with other international research agencies, resulting in a reduction in the information provided to the Bureau and reluctance on the part of other international research agencies to participate in research activities with it in the future. This will restrict the ability of the Bureau to undertake research and would impact on the quality of its research activity."

38. The Acting Commissioner concluded:

"27. I consider that damage to the relationship between the Bureau and NIWA, and between the Bureau and other international research organisations, is damage to the international relations of the Commonwealth. This view is consistent with Part 5.30 of the Guidelines.

28. I have considered the Bureau's and NIWA's submissions and have decided that if any information provided to the Bureau by NIWA, any information about the peer review, or any information revealing the identity of staff working on the peer review is disclosed, it could reasonably be expected to damage the relationship not only between the Bureau and NIWA, but also between the Bureau and other international research organisations. The damage that could reasonably be expected to result from disclosure is a loss of trust in the Bureau as the holder of confidential material which would have the effect of reducing the willingness of NIWA and other international organisations to consult with the Bureau."

39. The withholding ground relied on by BoM on which the Acting Freedom of Information Commissioner provided her opinion is fundamentally different from the section 9(2)(ba)(i) withholding ground. However, both BoM before the Acting Commissioner and NIWA before me raised essentially the same considerations relating to the effect of the release of information in documents exchanged in confidence for peer review purposes. The factual basis of the Acting Commissioner's decision mirrors the relevant facts in this

case. In reaching her decision, the Acting Commissioner clearly considered it relevant that the disclosure of the peer review material could reasonably be expected to damage the relationship between BoM and NIWA (and also their relationship with other research organisations), and cause a loss of trust in BoM as the holder of confidential material. These factors, in the Acting Commissioner's opinion, could mean that other similar organisations would be reluctant to consult with BoM and NIWA in the future. While I have not found it necessary to consider the point, the reasons given by the Acting Commissioner in her decision suggest that section 6(b) of the Official Information Act could also provide a basis for withholding the information in this case.

Findings on section 9(2)(ba)(i)

40. For the "good reason" in section 9(2)(ba)(i) to apply to the information at issue:

- the information at issue must be subject to an obligation of confidence (either explicitly or implicitly);
- the making available of the information at issue 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.

41. In November 2014, the complainant submitted:

"42. ... the expectations of confidentiality were one-way. When it received a request, BOM voluntarily produced the BOM Schedule and had no objection to providing copies unless requested by NIWA to withhold them. The Australian Acting Commissioner (quoted at paragraph 33 of the Opinion) noted that: 'NIWA strongly objected to the release of the information...' while there is no indication that these strong feelings were reciprocated.

43. One can imagine that BOM might be outraged if NIWA were to deliberately breach the convention of confidentiality for journal peer review. If, for example, a NIWA team had submitted a paper to an international scholarly journal whose editor had appointed a BOM scientist as one of the panel of anonymous peer reviewers. Let us assume that the editor then sends some of the reviewers' comments to NIWA, who somehow guess that a BOM person was on the panel. If NIWA were then to publicise the BOM reviewer's opinions, they would be in bad odour with all of the science publishing world. It is quite possible (I'm not sure about 'likely') that BOM might want to punish NIWA by refusing to send them information for a period.

44. The bilateral situation here is very different from that scenario. There is no independence or anonymity. There is no confidentiality convention. Even so, NIWA has struggled for several years to keep the BOM opinion

secret. If the law finally requires NIWA to divulge, BOM is hardly likely to punish them by declining to cooperate in future.”

42. The complainant drew a distinction between “*journal peer review*” and “*external peer review*”, and contended that NIWA had not established the basis for a convention of confidentiality relating to “*external peer review*”.
43. While I doubt the validity of the distinction drawn by the complainant between “*journal peer review*” and “*external peer review*”, that is not the essential issue I must address with regard to the “*good reason*” in section 9(2)(ba)(i). The issue I must address is whether the information at issue is subject to a mutual obligation of confidence between NIWA and BoM.
44. I am satisfied, as was Venning J in *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd*,⁶ that NIWA supplied the information at issue to BoM for the purpose of peer review on the basis BoM kept that information confidential – a basis BoM accepted. In dismissing the Trust’s application for judicial review of NIWA’s decision to publish the ‘*Seven-Station Temperature Series*’, Venning J stated:

*“[183] ... the plaintiff alleges that in deciding to publish the review without following scientific opinion and without an independent peer review NIWA acted unreasonably. The plaintiff cannot make out this allegation. **The review was in accordance with recognised scientific opinion. The review was peer reviewed.**”* (emphasis added)
45. Based on the information provided by NIWA, I am satisfied that the information at issue is subject to an express obligation of confidence. While it appears that that express agreement was not documented, I am satisfied that there was an express oral agreement between NIWA and BoM that the information at issue would be kept confidential by BoM, and it was on that basis that NIWA provided that information to BoM to be peer-reviewed.
46. Further, I am satisfied that, in accordance with longstanding scientific conventions, the information at issue was provided by NIWA to BoM on the basis that it would be peer-reviewed in confidence. That is the very basis on which such peer-reviewing is conducted.
47. In terms of section 9(2)(ba)(i), “*would [the making available of the information] be likely to prejudice the supply of similar information*”? In *Commissioner of Police v Ombudsman*⁷ the Court of Appeal interpreted the phrase “*would be likely*” to mean “*a serious or real and substantial risk to a protected interest, a risk that might well eventuate*”.
48. I am satisfied that there is a real risk that NIWA’s ability to supply information similar to the information at issue to BoM (or a similar organisation) would be prejudiced, if that

⁶ See footnote 1 above.

⁷ [1988] 1NZLR 385, 391.

information were released. (The Acting Commissioner accepted BoM's submission to the same effect.⁸)

49. Is it *"in the public interest that [the information at issue] should continue to be supplied"*?
50. NIWA stressed how much information it releases to the public concerning climate issues, including the *'Seven-Station Temperature Series'* information. It stated:

"NIWA is a very open organisation. It already makes its raw and adjusted temperature data available to the public through its climate database, which is accessible via its website (<http://cliflo.niwa.co.nz>). In addition NIWA widely and publicly publishes its research findings both in peer reviewed and general publications, through its various reports and public presentations and by direct interaction with the public and end users of its research. It has a keen interest in disseminating its research findings as widely as possible so that the public are aware of climate change issues. In relation to [the complainant's] request, NIWA made the final peer reviewed station reviews, along with a confirmation from BoM that it had undertaken an independent peer review, available to the public. In addition, the original station reports and data used in the reviews were made freely available to the public.

Those activities and dissemination channels mean that NIWA's research, the data it analyses to develop research results, its methodologies and various analyses are widely available. This allows other researchers (and the public) if they so wish, to reproduce and verify or otherwise, NIWA's research, results and conclusions. This allows members of the public to assess the veracity and validity of NIWA's research and verify the scientific basis upon which policy decisions are made by the Crown and territorial authorities. To this extent NIWA contributes to the development and administration of policies and laws and assists the public to participate in that process."

51. Accordingly, it seems clear that NIWA's information and views concerning climate issues are not hidden from public view. On the contrary, they are widely disseminated.
52. Contrary to the complainant's contentions:
- BoM's peer review was not a commercial consultancy project; rather NIWA asked BoM to undertake that review and BoM, in the spirit of scientific collaboration, agreed;
 - while the complainant is correct in his statement regarding the use of the term *'term d'art'* in its application *"to action initiated by editors of learned scientific journals considering manuscripts submitted for publication"*, the nature of the peer review conducted by BoM was fundamentally different, and, in any event, was conducted on the basis the information at issue would be kept confidential; and

⁸ See footnote 5 at para 28.

- NIWA's ability to have its projects peer-reviewed by BoM or a similar organisation would be jeopardised, whether that peer review was conducted on a commercial or non-commercial basis.
53. I am satisfied that it is in the public interest that information of the character of the information at issue should be continued to be supplied by NIWA to BoM (or to a similar organisation) for the purpose of peer review. The information at issue is part of NIWA's continuing research into climate issues in respect of which scientists are collaborating on a world-wide basis. It is in the public interest that organisations such as NIWA should be able to have their research peer-reviewed to ensure the information it publishes has a credible scientific basis. Section 9(2)(ba)(i) therefore applies to the information.

Section 9(1) Official Information Act 1982: public interest

54. Where a section 9(2) withholding provision applies, I must consider whether, for the purposes of section 9(1), the withholding of the information is outweighed by public interest considerations favouring release of the information.
55. It is in the public interest that, in respect of an issue as important as climate change, there should be as much information made available to the public as is reasonably possible. Climate change issues are at present a matter of considerable debate both in the scientific community and in the general public arena.
56. As a publicly funded organisation, it is in the public interest that NIWA provides information in a transparent way and in a way which fosters public debate. Whether or not climate change is occurring is a matter of profound public importance.
57. Based on information provided by NIWA, it is apparent that NIWA disseminates widely, and in an accessible way (such as the provision of material on its website), information of the character peer-reviewed by BoM. I acknowledge there is a public interest in the information requested in terms of the accountability and transparency of NIWA as a government agency. However, it is clearly also in the public interest that NIWA is able to conduct research and participate in projects with other overseas research agencies. The scientific convention that information is provided in confidence for the purpose of peer-reviewing goes some way to ensuring that the information NIWA provides to the public has a credible scientific basis. The making available of the information at issue would restrict NIWA's ability to undertake research and would be likely to impact on the quality of its research and the findings it makes public.
58. It is in the interests of research that the scientific convention should not be undermined, and NIWA and BoM should be able to trust one another to maintain confidentiality about communications relating to peer reviewing.
59. Accordingly, in my opinion, NIWA is entitled to rely on section 9(2)(b)(i) to withhold the information at issue, and the public interest in making that information available does not outweigh the need to withhold it under that provision.
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Chief Ombudsman's opinion

60. It is my opinion that:

- NIWA was entitled to rely on section 9(2)(ba)(i) of the OIA to withhold the information at issue; and
- the interest protected by section 9(2)(ba)(i) is not, in terms of section 9(1) of the OIA, outweighed by other considerations rendering it desirable in the public interest to make the information at issue available.

Dame Beverley A Wakem DNZM, CBE
Chief Ombudsman

Appendix : 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.

5. Principle of availability

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

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—

...

- (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;

...

- (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;

...

- (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;

...

12. Requests

- (1) Any person, being—
 - (a) a New Zealand citizen; or
 - (b) a permanent resident of New Zealand; or
 - (c) a person who is in New Zealand; or
 - (d) a body corporate which is incorporated in New Zealand; or
 - (e) a body corporate which is incorporated outside New Zealand but which has a place of business in New Zealand,—

may request a department or Minister of the Crown or organisation to make available to him or it any specified official information.

...

- (2) The official information requested shall be specified with due particularity in the request.

...

18 Refusal of requests

A request made in accordance with section 12 may be refused only for 1 or more of the following reasons, namely:

- (a) that, by virtue of section 6 or section 7 or section 9, there is good reason for withholding the information;
- (b) that, by virtue of section 10, the department or Minister of the Crown or organisation does not confirm or deny the existence or non-existence of the information requested;
- (c) that the making available of the information requested would—
 - (i) be contrary to the provisions of a specified enactment; or
 - (ii) constitute contempt of court or of the House of Representatives;
- (d) that the information requested is or will soon be publicly available;

- (da) that the request is made by a defendant or a person acting on behalf of a defendant and is—
 - (i) for information that could be sought by the defendant under the Criminal Disclosure Act 2008; or
 - (ii) for information that could be sought by the defendant under that Act and that has been disclosed to, or withheld from, the defendant under that Act:
 - (e) that the document alleged to contain the information requested does not exist or cannot be found:
 - (f) that the information requested cannot be made available without substantial collation or research:
 - (g) that the information requested is not held by the department or Minister of the Crown or organisation and the person dealing with the request has no grounds for believing that the information is either—
 - (i) held by another department or Minister of the Crown or organisation, or by a local authority; or
 - (ii) connected more closely with the functions of another department or Minister of the Crown or organisation or of a local authority:
 - (h) that the request is frivolous or vexatious or that the information requested is trivial.
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