

Overseas Investment Office consent application summaries

Legislation	Official Information Act, sections 9(2)(b)(ii) and 9(2)(a)
Agency	Overseas Investment Office
Ombudsman	Professor Ron Paterson
Case number(s)	340849, 348452, 352601, 366018, 373551, 378577, 384731, 392988, 398304
Date	June 2016

Summary

Ombudsman Ron Paterson carried out an investigation of multiple complaints made by the Campaign Against Foreign Control of Aotearoa (CAFCA) against various decisions by the Overseas Investment Office (OIO) to withhold information redacted from some of the summaries of its decisions on consent applications for investment in sensitive New Zealand assets. These summaries are routinely published on its website.

Given the number of complaints under investigation, and that CAFCA would continue to make requests for this information, the Ombudsman met with CAFCA and the OIO with a view to discussing the approach to making requests and the decision-making process. This led to a review by the OIO of its procedures and a revised decision in respect of information withheld from many of the summaries, with acceptance that in many cases the 'consideration' or price paid by an applicant for OIO consent, could be released.

In a few cases, the Ombudsman found that it was necessary to withhold information the OIO had redacted on grounds that it would unreasonably prejudice the commercial position of the applicants (OIA s 9(2)(b)(ii)) or to protect the privacy of named individuals (OIA, s 9(2)(a)), in circumstances where there was no over-riding public interest in disclosure.

Background

1. The OIO publishes on its website decision summaries for consent applications granted and declined.¹ In a majority of cases, the decision summaries are published in full but in some cases, information is withheld.² The withheld information is most often the amount paid, or the ‘consideration’.
2. For many years, CAFCA has routinely asked the OIO to provide it with the information withheld from published decision summaries. In most of those cases, the OIO has refused CAFCA’s request on the basis that it is necessary to withhold the information to protect information where the making available of that information ‘*would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information*’ (OIA s 9(2)(b)(ii)). In a few cases, the OIO determined that it was necessary to withhold the information to ‘*protect the privacy of natural persons, including that of deceased natural persons*’ (OIA s 9(2)(a)), or 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 information from the same source, and it is in the public interest that such information should continue to be supplied*’ (OIA s 9(2)(ba)(i)).
3. Where the OIO refused CAFCA’s requests, CAFCA has sought an Ombudsman’s review of the OIO’s decision. This has generally resulted in 3–4 complaints to the Ombudsman each year. Between September 2012 and February 2015, CAFCA submitted 10 complaints to the Ombudsman, relating to 108 decision summaries released by the OIO between April 2012 and October 2014.

Investigations

4. In April 2015, the Ombudsman met with representatives of CAFCA, and with the OIO, to discuss the decisions, complaints and investigations. The Ombudsman was interested in whether a different approach to the requests, the OIO’s practice in relation to the release of decision summaries, and the Ombudsman’s handling of CAFCA’s complaints, might achieve a more satisfactory outcome. Aside from the relevant provisions of the OIA that were most often relied upon in refusing CAFCA’s past requests, the Ombudsman noted he was mindful of several factors including:
 - a. the purposes of the OIA as set out in section 4, which include:
 - (a) *to increase progressively the availability of official information to the people of New Zealand in order—*

¹ <http://www.linz.govt.nz/regulatory/overseas-investment/decision-summaries-statistics>

² The OIO estimates that 85% of decision summaries are released in full.

(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. changes that have occurred over recent years in terms of the public availability of information and relevant public interest considerations;
 - c. the fact that in many circumstances, confidentiality diminishes with the passage of time; and
 - d. the resources expended by the OIO and the Ombudsman in dealing with CAFCA's requests and complaints.
5. As a result, CAFCA agreed that, when submitting a complaint to the Ombudsman, it would give further thought to the particular public interest in the information withheld from a decision summary. The OIO agreed to review the information withheld from the decision summaries published between April 2012 and October 2014, and its overall process for decision summaries released with some information withheld.
6. In March 2016, the Ombudsman wrote to CAFCA about the outcome of the OIO's review, which had resulted in:
- a. the release of information previously withheld from 88 decision summaries;
 - b. a process for the release of information from a further 16 decision summaries within a specified period (subject to the consideration of any submissions by the applicants as to why withholding is still warranted);
 - c. a commitment to reviewing the information withheld from decision summaries released between November 2014 and May 2015; and
 - d. the implementation of a new process from May 2015 for decision summaries that are released with some information withheld.
7. The Ombudsman advised CAFCA:

With these actions, the OIO has effectively changed its starting position with respect to information that is deemed confidential when a decision summary is released — that is, confidentiality is maintained for a specified period rather than indefinitely. The onus is on applicants to contact the OIO if they consider that there are good grounds under the OIA for continuing to withhold the information after the expiry of the specified period.

The outcome of the OIO's review of the cases from April 2012 to October 2014 is telling. In more than 80% of cases, the OIO decided that the grounds for withholding no longer applied or were outweighed by public interest

considerations favouring disclosure. In a further 15% of cases, the OIO has put in place arrangements to release the information at a specified time in the future, subject to the consideration of any submissions by applicants as to why withholding is still warranted.

At this stage I see no reason to consider that similar results will not occur in the future. It appears very likely that the process implemented by the OIO will result in the proactive release of more information, albeit not immediately.

8. CAFCA was invited to comment. In April 2016, it advised that as a result of the OIO's review and the process now in place, CAFCA would no longer automatically request the information from the OIO, or complain to the Ombudsman if the OIO refused a request, but it may do so if the OIO continued to withhold the information for longer than 12 months.

Outcome

9. The Ombudsman formed a final opinion in respect of four decision summaries, which contained information that the OIO proposed to withhold indefinitely. The Ombudsman formed the opinion that section 9(2)(b)(ii) of the OIA applied and was not outweighed by public interest considerations favouring disclosure. In two of four decision summaries, the Ombudsman was satisfied that section 9(2)(a) also applied.
10. The Ombudsman discontinued his investigations of complaints relating to decision summaries that were released in full as a result of the OIO's review, and complaints relating to decision summaries scheduled for further review by the OIO, on the basis that further investigation was unnecessary.³

³ The outcome of the OIO's review of one decision summary subsequently became the subject of an Ombudsmen Act complaint and is yet to be determined.