



Request for information relating to request for inquiry into convictions of Peter Ellis

Legislation	Official Information Act 1982, s 9(2)(g)(i) (see Appendix 1 for full text)
Requester	Dr Lynley Hood and Dr Don Brash
Agency	Ministry of Justice
Ombudsman	Judge Peter Boshier
Case number	407773
Date	October 2016

Contents

Summary	2
Ombudsman's role	2
Background	2
Request	4
Information released	4
Information not held	4
Information not released	4
Complaint	5
Investigation	5
Analysis and findings	6
Section 9(2)(g)(i)	6
Section 9(1)	7
Opinion	8
Appendix 1. Relevant statutory provisions	9

Summary

Dr Lynley Hood and Dr Don Brash, the complainants, requested information held by the Ministry of Justice relating to their request to the Minister of Justice, Hon Amy Adams (the Minister), for a Commission of Inquiry into the Peter Ellis case. In response to their request, the Ministry released certain material, including Ministry advice to a previous Minister of Justice, Hon Simon Power, and Crown Law advice in 2009 on the appointment of a Commission of Inquiry. The complainants complained about the Minister's refusal to release the following information:

- drafts of a letter sent to the complainants responding to their request for a Commission of Inquiry; and
- information redacted from emails between Ministry officials and the Minister's office in reliance on section 9(2)(g)(i) (maintenance of the effective conduct of public affairs through the free and frank expression of opinions) of the Official Information Act 1982 (OIA).

The Ministry provided the Ombudsman with copies of the draft letters and unredacted copies of the emails. The emails and the draft letters show the officials, after discussion with the Minister's office, settled the form of the letter the Minister sent to the complainants, reflecting the Minister's opinion there was no justification for a Commission of Inquiry. A reading of the emails shows officials going about their work in an open and frank way.

I formed the opinion that the Ministry was entitled to withhold the information at issue in reliance on section 9(2)(g)(i). In my opinion, the release of that information would inhibit the future free and frank exchange of opinions between officials and Ministers. Officials must be able to express their opinions on relevant issues freely and frankly—that is an essential ingredient of the climate necessary for the effective conduct of public affairs.

Ombudsman's 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. The Ministry 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

2. In 1993, Mr Peter Ellis was convicted of sixteen counts of indecency in relation to seven children attending the Christchurch Civic Crèche (since closed). He was sentenced to ten years imprisonment.

3. In 1994, the Court of Appeal heard Mr Ellis' first appeal; it set aside three of his convictions; and dismissed the balance of his appeal against his convictions and sentence.
4. In May 2016, in its report to this Office, the Ministry of Justice summarised the history of various applications in a petition to Parliament made by Mr Ellis as follows:

Mr Ellis then applied for the Royal prerogative of mercy. Acting on advice from the Ministry, the then Minister of Justice advised the Governor-General to refer the remaining convictions back to the Court of Appeal. A second application for the Royal prerogative of mercy resulted in the issues before the Court of Appeal being broadened. In 1999, the Court of Appeal dismissed Mr Ellis' second appeal.

After the second appeal was dismissed, a third application for the Royal prerogative of mercy was made. The then Minister of Justice established a Ministerial inquiry to assess whether any features of the investigation and/or interviews of the children might have affected the reliability of the children's evidence to such an extent as to render Mr Ellis' convictions unsafe. In 2001, the report concluded that the case advanced by Mr Ellis fell short of satisfying the Inquiry that the convictions were unsafe.

In 2003, [the complainants] made a petition to Parliament requesting a Royal Commission of Inquiry. After hearing submissions and giving the matter careful consideration, the Justice and Electoral Committee did not recommend that an inquiry be established.

In 2008, [the complainants], with the support of Katherine Rich MP, renewed their request to the then Minister of Justice, Hon Simon Power. In October 2009, Minister Power announced that after extensive examination of the case and consultation with Cabinet, he would not recommend a Commission of Inquiry into the Peter Ellis case.

In December 2014, [the complainants] wrote to the current Minister of Justice, Hon Amy Adams, requesting a Commission of Inquiry into the Peter Ellis case. This request was almost exactly the same as the previous request to Minister Power in 2008. On 21 April 2015, Minister Adams advised [the complainants] of her decision not to recommend a Commission of Inquiry. In her correspondence, Minister Adams highlighted that the evidence Dr Hood and Dr Brash discussed from Professor Harlene Hayne had never been produced in support of an application for the Royal prerogative or requests for a Commission of Inquiry. Minister Adams further noted that the proper channels for Mr Ellis to challenge his convictions remained open to him. Those options are an application for leave to appeal to the Privy Council or, where there is persuasive new evidence that goes to the heart of Mr Ellis' convictions that has not been previously considered, a further application for the Royal prerogative of mercy.

Request

5. In April 2015, the complainants requested the following information:

all notes, memos, reports, correspondence received and sent by the Ministry of Justice in response to the 17 December 2014 letter [sent] to the Minister of Justice from Dr Don Brash & Dr Lynley Hood in relation to the Christchurch Civic Crèche case and the conviction of Peter Ellis.

Information released

6. In May 2015, in response to the complainants' requests, the Ministry released a significant amount of information, including:
- advice of Deputy Solicitor-General Cheryl Gwyn and John Pike, General Counsel, Crown Law, in April 2009 provided to the Attorney General concerning a proposed Commission of Inquiry into the Peter Ellis case;
 - the Ministry report to Hon Simon Power in March 2009 concerning the complainants' request for a Commission of Inquiry;
 - advice of the Ministry Chief Legal Counsel, Mr Jeff Orr, to the then Minister of Justice, Hon Simon Power in May 2009 concerning, inter alia, a request for a Commission of Inquiry into the Peter Ellis case;
 - various correspondence; and
 - redacted emails between various Ministry officials and the Minister's office (as described in the Ministry response to the complainants' request).

Information not held

7. The Ministry advised Dr Hood that it did not hold any memoranda or reports from external parties in relation to the request. It submitted it was entitled to rely on section 18(g) of the OIA to refuse that part of the request. The text of that provision is set out in [Appendix 1](#).
8. The complainants made no complaint about the Ministry's reliance on section 18(g) of the OIA.

Information not released

9. The information not released (the information at issue) was:
- drafts of the Minister's letter of 21 April 2015 responding to the complainants' letter of 14 December 2014 requesting a Commission of Inquiry into the Peter Ellis case; and

- information redacted from emails between Ministry officials and the Minister's office.
10. The Ministry relied on sections 9(2)(a) (protection of privacy of natural persons) and 9(2)(g)(i) of the OIA to withhold the information redacted from the emails.
 11. The complainants made no complaint about the withholding of the information in reliance on section 9(2)(a).
 12. Section 9(2)(g)(i) reads:
 - (2) *Subject to sections 6, 7, 10, and 18,¹ this section applies if, and only if, the withholding of the information is necessary to—*
 - ...
 - (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;*
 13. Section 9(2)(g)(i) is subject to section 9(1) of the OIA:
 - (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.*

Complaint

14. In July 2015, the complainants complained to this Office about the Ministry's reliance on section 9(2)(g)(i) to refuse to release the information at issue.

Investigation

15. In April 2016, this Office notified the Ministry of the complaint, and requested copies of the information at issue.
16. In May 2016, the Ministry provided a report in response to the complaint, and copies of the information at issue and the information released.

¹ As sections 6, 7, and 10 are not relevant to this investigation, I do not discuss their effect.

17. In August 2016, I advised the Ministry and the complainants of my provisional opinion. Both the Ministry and the complainants provided comments.

Analysis and findings

Section 9(2)(g)(i)

18. Section 9(2)(g)(i) applies if it is ‘*necessary*’ to withhold information to protect the interest described in that provision. An early High Court decision² interpreted ‘*necessary*’ to mean **reasonably**, rather than **strictly** necessary. More recently, however, the High Court³ (without reference to the earlier decision) interpreted ‘*necessary*’ to mean **essential**.
19. I prefer the earlier interpretation, namely, that for section 9(2)(g)(i) (or any withholding ground set out in section 9(2) of the OIA) to apply, it must be **reasonably** necessary to withhold the information to protect that interest.
20. In Part 2C of the Ombudsmen’s Practice Guidelines on official information, in relation to section 9(2)(g)(i), the following questions are posed:⁴

Will release of the information:

- *Inhibit future free and frank expressions of opinion?*
- *Mean that in the future opinions will be expressed in a different way, and will not be expressed in such a free and frank manner?*
- *Mean that similar free and frank expressions of opinion are not recorded adequately in the future?*

21. As the Danks Committee stated:⁵

Only if disclosure is likely to inhibit the free and frank expression of opinion and thereby adversely affect the conduct of public affairs may a reason for withholding [the information] under this head exist. Even in that case, it must be weighed against other public interests.

22. Having read the emails, I am satisfied that the information at issue consists of:
- an exchange of opinions between officials and the Minister’s office in the course of their duty; and

² *Television New Zealand Ltd v the Ombudsman* [1992] 1NZLR 106, 118 (Heron J).

³ *Kelsey and Others v the Minister of Trade* [2015] NZHC 2497, para 141 (Collins J).

⁴ Office of the Ombudsman ‘Official information legislation guide’, part 2C, ‘Free and Frank Expressions of Opinion’, p 3. See ‘Resources and publications’, www.ombudsman.parliament.nz.

⁵ ‘Towards Open Government’; Supplementary Report of Committee on Official Information (July 1981), p 54.

- the exchange of opinions related to drafts of the letter of 21 April 2015 from the Minister to the complainants.
23. From a reading of the information at issue, it is clear that officials were freely and frankly exchanging comments with the Minister's office on the drafts of the letter, and the draft letters are part of that exchange.
24. I am satisfied that the release of the information at issue will inhibit the future free and frank expression of opinions by officials to Ministers. Officials must be able to express their opinions on relevant issues freely and frankly—that is '*an essential ingredient of the climate necessary for the effective conduct of public affairs.*'⁶
25. I accept that section 9(2)(g)(i) applies to the information at issue.

Section 9(1)

26. Having accepted that section 9(2)(g)(i) applies to the information at issue, I must consider whether, in terms of section 9(1), the withholding of that information is outweighed by other considerations rendering it desirable, in the public interest, to make that information available.
27. The issue under section 9(1) is not simply whether there is a 'public interest' in making the information available, but rather whether any public interest considerations favouring disclosure outweigh the interest protected by withholding the information at issue.
28. Section 5 of the OIA recognises the principle that the information '*shall be made available unless there is good reason for withholding it*'.
29. In terms of the countervailing public interest under section 9(1), in this case, factors to be taken into account are:
- the transparency of the administration of the justice system relating to the complainants' request for a Commission of Inquiry into the Peter Ellis case; and
 - the accountability of officials in providing advice to the Minister of Justice concerning that application and Mr Ellis' convictions.
30. The complainants submit they are entitled to access the information at issue in keeping with one of the OIA's purposes set out in section 4(b), that is:
- to provide for proper access by each person to official information relating to that person...*
31. With reference to that purpose, the complainants state:
- We raise this point because the documents in questions are drafts of a letter intended for Dr Brash and Dr Hood – surely we are entitled to read them?*

⁶ See footnote 4 above, p 2.

32. The information at issue relates to the drafting of a response to the complainants and does not constitute information about them personally.
33. As the brief history of court decisions and applications outlined above indicates, Mr Ellis' convictions have been the subject of significant consideration by the courts, Ministers of Justice and the Ministry. I accept there is a general interest on the public's part in the issues raised by this case, but that interest is not determinative of the public interest under section 9(1).
34. What matters, in this instance, in terms of transparency and accountability, is whether the officials provided their advice in a free and frank manner on the Minister's response to the complainants' request for a Commission of Inquiry.
35. A reading of the information at issue demonstrates, as the Ministry describes, '*the rationale for withholding the information*', ie:

To allow a safe forum for officials to debate and put forward various ideas on topical issues for the Minister to consider, thereby ensuring the Minister receives robust and frank advice from officials in the decision making process.
36. The emails show the officials going about their work in an open and frank way settling on the form of the letter of 21 April 2015 to the complainants reflecting the Minister's opinion there was no justification for a Commission of Inquiry into the Peter Ellis case.
37. I am not satisfied that the countervailing public interest in terms of section 9(1) outweighs the need to protect the interest described in section 9(2)(g)(i) of the OIA.

Opinion

38. I am of the opinion that the Ministry is entitled to rely on section 9(2)(g)(i) to withhold the information at issue.

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.

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—
 - (a) protect the privacy of natural persons, including that of deceased natural persons; 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;

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:

...
- (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: