

## Request for advice received concerning partnership (charter) schools

### Ombudsman's opinion

<b>Legislation:</b>	Official Information Act
<b>Agency:</b>	Associate Minister of Education
<b>Ombudsman:</b>	David McGee
<b>Reference number:</b>	328421
<b>Date:</b>	7 March 2013

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## Summary

The confidence and supply agreement between two of the parties forming the government following the 2011 general election included provision for the creation of a new type of school in the New Zealand educational system, known as partnership schools. The requester sought advice relating to the development of partnership (charter) schools policy from the Associate Minister of Education. The Associate Minister originally decided to disclose some information and withhold other material under section 9(2)(f)(iv) of the Official Information Act (OIA). This section provides for the maintenance of the confidentiality of advice tendered by Ministers and officials. Upon reconsideration, the Associate Minister decided to disclose further information, but still withheld information about the funding of such schools under the same section. The Ombudsman is of the opinion that section 9(2)(f)(iv) did not provide good reason to withhold this information. Other information was withheld under section 9(2)(h) of the OIA, which provides for the maintenance of legal professional privilege. The Ombudsman is of the opinion that section 9(2)(h) did provide good reason to withhold that information.

## Relevant statutory provisions

Official Information Act sections 4 (purposes), 5 (principle of availability), 9(1) (public interest test), 9(2)(f)(iv) (constitutional convention protecting the confidentiality of advice tendered by Ministers and officials), 9(2)(h) (legal professional privilege).

See the Appendix for the full text of these provisions.

## Background

1. On 20 February 2012, Mr Tom Haig made an OIA request on behalf of the New Zealand Post Primary Teachers Association (NZPPTA) to the Associate Minister of Education, Mr John Banks. The request sought:
  - *“research and background documents regarding charter schools used to inform the policy decision*
  - *advice from ministry or parliamentary staff or external consultants relating to the development of charter schools policy*
  - *correspondence, meeting minutes and discussion documents relating to the development of this policy*
  - *regulatory impact statements and analysis of the effect of charter schools policy carried out by parliamentary or ministry staff, including costings.*
  - *correspondence or meeting minutes with external organisations.”*
2. On the same date he also made an OIA request to the Secretary for Education in similar terms to his request to the Associate Minister of Education. This request also sought:

- *“advice from Ministry of Education staff relating to the development of charter schools policy.*
  - *regulatory impact statements and analysis of the effect of charter schools policy carried out by ministry staff, including costings.*
  - *correspondence or meeting minutes with external organisations.”*
3. The Secretary for Education transferred the request to the Associate Minister of Education for response, pursuant to section 14(b)(ii) of the OIA.
4. The Associate Minister of Education responded on 20 March 2012. He stated:
- “The documents you have requested are enclosed and are itemised in the attached list.*
- Information has been withheld under section 9(2)(f)(iv) to maintain constitutional conventions which protect the confidentiality of advice tendered by Ministers of the Crown and officials, and under section 9(2)(h) to maintain legal professional privilege.*
- There do not appear to be overriding public interest reasons that support the release of the information withheld.”*
5. Four documents were listed. Three were disclosed in part, and one was withheld entirely.
6. Advice dated 20 December 2011 entitled Initial Discussion on charter schools was released in part, with some material withheld under section 9(2)(f)(iv). Advice dated 25 January 2011 entitled *Background overview of section 156 schools* was released in part, with some material withheld under section 9(2)(f)(iv). Advice dated 1 February 2012 entitled *Initial Advice on charter schools* was released in part, with some material withheld under section 9(2)(f)(iv). Advice dated 10 February 2012 entitled *Implementing charter schools within existing legislation* was withheld entirely under sections 9(2)(f)(iv) and 9(2)(h).
7. Mr Haig made a complaint to me on 22 March 2012 about the response received from the Associate Minister of Education.

## Investigation

8. The complaint was notified to the Associate Minister of Education on 25 July 2012, and he was asked to supply me with a copy of the information at issue. The Associate Minister responded on 10 August 2012. He enclosed a copy of a letter sent to the NZPPTA the same day. This informed Mr Haig that the Associate Minister had reconsidered his earlier response to the request and no longer believed it was necessary to withhold many of the sections that were previously redacted. The Associate Minister advised that, on that basis, he would release new copies of the requested information reflecting his fresh decision.

9. Material was still withheld from the advice of 20 December 2011 and 1 February 2012, but the entirety of the 25 January 2012 advice was now disclosed. The advice of 10 February 2012 was now disclosed, aside from an appendix containing an opinion by the Ministry's Chief Legal Adviser that set out a brief analysis of the provisions of the Education Act 1989 against what was known (at the time) about proposals to establish charter schools. This was still withheld entirely, pursuant to section 9(2)(h) of the OIA.
10. After considering this material Mr Haig was contacted on 30 October 2012 to ascertain whether he wished to pursue the outstanding deletions. Mr Haig responded on 31 October 2012. He confirmed that he wished me to continue my investigation into the fresh decision of 10 August 2012 on the request, particularly regarding the withheld sections of the 1 February 2012 document under the headings 'Resourcing charter schools' and 'Operating funding'.
11. The Associate Minister had not, as yet, supplied me with unredacted copies of the information at issue. These were supplied on 6 November 2012 and 24 January 2013.
12. After taking into consideration the information provided by both the Associate Minister and the complainant I formed a provisional opinion on the complaint.
13. On 20 February 2013 I wrote to the Associate Minister advising him of my provisional opinion on the application of section 9(2)(f)(iv) to the information about the funding of partnership (charter) schools. I also wrote to Mr Haig, advising him of my provisional opinion on the application of section 9(2)(h) to the opinion of the Ministry's Chief Legal Adviser.
14. On 5 March 2013 Mr Haig advised me that he accepted my provisional opinion on the withholding of the legal opinion and was withdrawing his request for that information.
15. On 6 March 2013 the Associate Minister advised me that he had noted my provisional opinion that section 9(2)(f)(iv) did not provide good reason to withhold information on the funding of charter schools, and added that he had no further comment to make on the issue.
16. After consideration of the responses received from the Associate Minister and the complainant, I have formed an opinion on the complaint.

## Analysis and findings

### Section 9(2)(f)(iv) of the OIA

#### General approach taken to this section

17. Section 9(2)(f)(iv) applies if the withholding of the information is necessary to maintain the constitutional convention which protects the confidentiality of advice tendered by Ministers of the Crown and officials, and the need to withhold the information is not outweighed by other public interest considerations which make it desirable to make the information available.

18. The purpose of the convention is to protect the ability of the government to receive and deliberate upon advice in an effective and orderly manner. The Ombudsmen have recognised that one purpose of the convention is to protect the ability of Ministers and Cabinet to consider advice, where release of the advice will prejudice the ability to decide what course of action to take.
19. Whether it is *necessary* to withhold the information requested in order to *maintain* the convention protected by section 9(2)(f)(iv) depends on whether there is reason to believe that the release of the information would undermine that convention. The stage reached in the policy-making process to which the information relates is relevant to this assessment.
20. Once a decision has been made, there may be no need for ongoing protection of the advice on which the decision was based. In some circumstances, the release of relevant information can have the positive effect of explaining to the public the reasons why certain policies have been developed or modified or other actions taken. Such an approach is consistent with the purpose of the OIA described in section 4(a)(ii): promotion of the accountability of Ministers of the Crown and officials.
21. In circumstances where the release of relevant information may take place after policy has been decided, but before legislation is enacted, disclosure is likely also to be consistent with section 4(a)(i) of the Act: enabling the people of New Zealand to participate effectively in the making and administration of laws and policies.

### Information at issue

22. The passages withheld from the Ministry of Education advice to Education Ministers of 20 December 2011 and 1 February 2012 are identical. They relate to the resourcing of charter schools and contain information about capital and operating funding. These are the only passages from these two documents that have not yet been disclosed.

### Application of section 9(2)(f)(iv) to this case

23. At the time of the initial request (20 February 2012) this advice was under consideration by Ministers. However, the Associate Minister of Education reconsidered his decision on 10 August 2012 and made a fresh decision on the original request. Mr Haig asked me to investigate and review the decision to continue to withhold the outstanding deletions. My investigation and review has therefore proceeded in respect of the fresh decision made on 10 August 2012.
24. Enclosed with the Associate Minister of Education's letter to Mr Haig of 10 August 2012 was a 'timeline of key events'. This documented the fact that on 30 July 2012 the Cabinet had agreed the "*key features and design elements for the New Zealand model of charter school*".
25. The Associate Minister's letter to me of the same date made clear that his decision to release further information to Mr Haig was (partly) "in light of Cabinet's recent decision in relation to charter schools".

26. The paper presented to Cabinet on 30 July 2012, and before that to the Cabinet Social Policy Committee on 25 July 2012, has been subsequently published on the Ministry of Education website.<sup>1</sup> Therefore it is clear that Cabinet and Ministers have already considered the advice tendered by the Ministry and reached a decision as to how they wished to proceed with the policy on charter (now known as partnership) schools.
27. In light of this, it is not clear that withholding the information at issue on 10 August 2012 was necessary to protect the ability of the government to receive and deliberate upon advice in an effective and orderly manner, nor that its disclosure would impinge upon the maintenance of the convention protected by section 9(2)(f)(iv).
28. Section 5 of the OIA requires that decisions on whether or not to disclose official information in response to a request must be determined in accordance with the purposes of the Act set out in section 4. As alluded to above, there are circumstances in which disclosure of policy advice will promote the accountability and participation purposes of the Act, and these factors are more likely to predominate in decisions on OIA requests once Ministers and/or Cabinet have had the opportunity to consider the advice that has been tendered.
29. The proposal to create of a new type of school within the New Zealand educational system is a significant step, and is – in my opinion – a circumstance in which the disclosure of policy advice at this stage in the process is required by section 5 of the OIA when considering the accountability and participation purposes of this enactment. Ministers cannot be held fully accountable for the proposals they are putting forward, unless the relevant information is in the hands of the public. Similarly, the public cannot adequately, let alone effectively, participate in the *'making and administration of laws and policies'*<sup>2</sup> if they are not apprised of key elements of the government's proposals. The resourcing of a public service is a key component in the development of policy and the public is entitled to know how the government intends that a new service – in this case a type of school – is to be funded.

## Section 9(1) of the OIA

30. Having reached the view that the interest protected by section 9(2)(f)(iv) does not apply, it is not necessary for me to consider whether “the withholding of [the] information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.” Section 9(1) is not about whether there is ‘a public interest’ making the information available (which there clearly is), but whether any considerations favouring disclosure in the public interest outweigh a justification for withholding information.

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<sup>1</sup> <http://www.minedu.govt.nz/theMinistry/PublicationsAndResources/RIS/NZModelCharterSchool.aspx> accessed on 13 February 2013.

<sup>2</sup> Section 4(a)(i) of the Official Information Act 1982.

## Section 9(2)(h) of the OIA

### General approach taken to this section

31. Section 9(2)(h) applies if the withholding of the information is necessary to maintain legal professional privilege, and the need to withhold the information is not outweighed by other public interest considerations which make it desirable to make the information available.
32. Section 9(2)(h) is an unusual withholding ground because it (subject to any public interest override) grants exemption to a particular class of information. This contrasts with other withholding grounds in section 9(2) of the OIA. These apply by reason of the effect their release has on identified public values (privacy, commercial position, etc). Therefore, where legal advice is concerned, there is an element of exemption because of who is the author of that advice.
33. Solicitor/client privilege applies to confidential communications between a legal adviser and client, where the legal adviser is acting in his or her capacity as such, and the communications are for the purposes of obtaining or giving legal advice.

### Information at issue

34. In this case there is one document which contains communications between a legal adviser and a client, where the client is the Crown. This is the opinion of the Ministry of Education's Chief Legal Adviser that was appended to the 10 February 2012 Education Report *Implementing Charter Schools within Existing Legislation*.

### Application of section 9(2)(h) to this case

35. I am satisfied that the communications in question were subject to solicitor/client privilege at the time they came into existence. In the circumstances, subject to any waiver of the privilege, I am of the opinion that withholding the information is "*necessary... to maintain legal professional privilege*" within the meaning of section 9(2)(h).
36. I have not seen evidence that privilege has been waived in this instance, either expressly or by implication. If there has been no implied waiver and the holder of the privilege does not wish to waive privilege, then the withholding of the information is necessary to maintain legal professional privilege. The Government's ability to withhold legal advice does not vary depending on the context in which the need for that advice was generated (litigation, commercial, policy, etc). As noted above, the exemption is predicated on the source of the advice.
37. My view is that section 9(2)(h) does apply in respect of the Chief Legal Adviser's "*analysis of the provisions of the Education Act 1989 against what is known about proposals to establish Charter Schools*", appended to the 10 February 2012 Education Report.

## Section 9(1) of the OIA

38. Having accepted that section 9(2)(h) applies, I have to consider whether “*the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available*” (section 9(1) refers).
39. Section 9(1) is not about whether there is “*a public interest*” in making the information available, but whether any considerations favouring disclosure in the public interest outweigh a justification for withholding information.
40. My view is that I do not consider that the public interest considerations which favour disclosure outweigh the section 9(2)(h) interests which apply. The disclosure of this information, particularly after the 10 August 2012 decision to disclose the covering report to which the legal advice is appended, would not so strongly contribute to either the accountability or participation purposes of the OIA (as outlined in section 4 of the Act) as to outweigh the public interest in maintaining legal professional privilege.

## Ombudsman’s opinion and recommendation

41. For the reasons set out above, I have formed the opinion that section 9(2)(h) provided good reason to withhold Appendix 1 of the 10 February 2012 Education Report: *Implementing Charter Schools within Existing Legislation*.
42. Further, I have formed the opinion that section 9(2)(f)(iv) did not provide good reason to withhold the following information:
  - paragraphs 34, 35, 36 and sub-paragraph b of paragraph 38 of the 20 December 2011 Education Report: *Initial Discussion on Charter Schools*.
  - paragraphs 33, 34, 35 and sub-paragraph b of paragraph 37 of the 1 February 2012 Education Report: *Initial Advice on Charter Schools*.
43. I recommend, pursuant to section 30(1)(a) of the OIA, that the Associate Minister of Education release this information.
44. Under section 32 of the OIA, a public duty to observe my recommendation will be imposed from the commencement of the 21st working day after the date of this opinion. This public duty applies unless, before that day, the Governor-General, by Order in Council, otherwise directs.

David McGee  
Ombudsman

## Appendix 1. Relevant statutory provisions

### 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—
  - f. maintain the constitutional conventions for the time being which protect—
    - i. [n/a]
    - ii. [n/a]
    - iii. [n/a]
    - iv. the confidentiality of advice tendered by Ministers of the Crown and officials;
  - g. n/a
  - h. maintain legal professional privilege.