

Investigation into availability of FairWay Reviewers' Benchbook under the Official Information Act

Legislation	Official Information Act 1982 (see appendix 1 for relevant provisions)
Agency	FairWay Resolution Ltd
Request for	Reviewers' Benchbook
Ombudsman	Professor Ron Paterson
Case number	399972
Date	May 2016

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Summary

A requester asked FairWay Resolution Ltd (FairWay) for a copy of a FairWay document known as the Reviewers' Benchbook. FairWay refused the request under sections 9(2)(b)(i) and 9(2)(b)(ii) of the Official Information Act 1982 (OIA), in order to protect information that would disclose a trade secret, and would be likely to unreasonably prejudice its commercial position.

FairWay submitted that its reviewers are not an organisation for the purposes of the OIA, on the basis that they exercise judicial functions and are therefore excluded by section 2(6).

I have concluded that FairWay's reviewers do not exercise judicial functions and are therefore subject to the OIA. In my opinion FairWay did not have good grounds to withhold the Benchbook.

Background

1. In January 2015, a requester made the following request to FairWay:

I request a copy of the latest version of your publication commonly referred to as the reviewers 'Benchbook'.

2. FairWay responded in February 2015:

Your request for information is refused under section 9(2)(b)(i) and section 9(2)(i) of the Official Information Act 1982, where it is considered necessary to protect the information where the making available of the information would disclose a trade secret, and to enable FairWay to carry out, without prejudice or disadvantage, commercial activities.

The Benchbook is a resource for reviewers. It was developed internally involving considerable time and effort. We consider the Benchbook to be of intellectual property value to FairWay.

It is our expectation that once the Benchbook was produced by FairWay, copyright attaches to this and FairWay has exclusive rights in regards to the reproduction and distribution. FairWay owns the Benchbook and it is designed to be used for the purpose of our staff only.

Where FairWay operates in a commercial environment, we consider that the Benchbook would be a useful tool to any competitor, and that if disclosed this would disadvantage our commercial activities.

3. In March 2015, the requester made a complaint to the Ombudsman about FairWay's refusal to provide the Benchbook. The requester submits that the Benchbook merely describes the various aspects of the law relating to the Accident Compensation Act 2001 (ACC Act), and that it is a collation of information already in the public arena, though somewhat dispersed.

4. Regarding FairWay's reliance on commercial grounds to withhold the information, the requester states:

In fact, meaningful competition does not currently exist. I understand that while ACC contracts a law firm in South Canterbury to conduct reviews locally, FairWay elsewhere has a nationwide monopoly on the provision of review services to ACC.

In any event, competition with hypothetical competitors would involve a wide range of factors other than access to the Benchbook – including the quality of reviewers and their decisions, the standard of service provided to ACC and its claimants, timeliness and price.

5. The requester submits that his request should have been responded to in light of the principles underlying the administration of justice, rather than claimed commercial considerations. Ready access to information in the Benchbook would increase accessibility to the ACC review jurisdiction and assist claimants and their representatives. The requester considers that information made available to reviewers should also be available to those who appear before them, and questions FairWay's reference to the Benchbook being a 'trade secret'.

Investigation

6. In August 2015, FairWay was notified of the Ombudsman's investigation, and asked to provide a copy of the Benchbook and a report explaining the reasons for refusing the request. FairWay provided the requested material in September 2015.
7. In January 2016, after considering the information at issue, FairWay's reasons for withholding, and the views of the requester, I advised FairWay of my provisional opinion that it did not have good grounds to withhold the Benchbook.
8. In February 2016, FairWay provided a response to my provisional opinion.
9. During this investigation, FairWay sought my views as to the applicability of the OIA to the judicial functions that it considered its reviewers were undertaking. It was suggested that, under section 2(6) of the OIA, the judicial functions of those reviewers did not constitute an 'organisation' to which the OIA applied.
10. In November 2015, I advised FairWay of my view that reviewers were not undertaking judicial or quasi-judicial functions, and that the section 2(6) exemption therefore did not apply. Extracts from my advice are included in Appendix 2.

FairWay's submissions

11. In responding to my initial request for comment, FairWay advised:

Benchbook is a document produced internally by a legally qualified reviewer member of staff at FairWay. It is a collection of case law in the Accident Compensation area from appellate jurisdictions. The document covers various topics and areas under the Accident Compensation Act 2001.

To compile Benchbook cases of particular relevance and significance are researched and identified. Summaries are then produced, with extracts of judgments included.

There is periodic update to the document, which can involve specific update and release based on the issuing of a particular judgment, or as the result of more general review.

12. FairWay considers that it operates in a commercial environment and that disclosure of the Benchbook would disadvantage its commercial activities. It therefore relied on section 9(2)(i) of the OIA to withhold the information:

Where FairWay operates in a commercial environment, we consider that the Benchbook would be a significant and useful tool to any competitor, and that if disclosed this would disadvantage our commercial activities. Given the time and effort spent to produce and maintain the document (which is over \$1000 annually), it is our view that if released a competitor would gain the benefit of the resource at no cost.

13. FairWay also relied on section 9(2)(b)(i) of the OIA:

We consider the Benchbook to be of intellectual property value to FairWay. It is our expectation that once the Benchbook was produced by FairWay, copyright attaches to this and FairWay has exclusive rights in regards to the reproduction and distribution. FairWay owns the Benchbook and it is designed to be used for the purposes of our staff and contractors only. We view Benchbook as being an in-house specialist resource.

In accordance with standard contractual provisions the Benchbook, as the confidential information of FairWay, is required to be returned at the end of employment or termination of contract, and must not be used for any purpose outside of terms of employment with FairWay.

14. In considering public interest factors in favour of disclosure, FairWay acknowledged a general interest in access to applicable case law, and in transparency of material provided to decision makers. It noted that the Benchbook may not include all relevant case law, and that FairWay wished to avoid the perception it is providing legal advice.

Section 2(6) OIA

15. In response to my provisional opinion that there were no good grounds on which to withhold the Benchbook, FairWay submits that its reviewers fall within section 2(6) of the OIA:

The starting point is that there can be no question that the Corporation, as a Crown entity, is exempt from the Act in relation to its judicial functions. Therefore, if the FairWay reviewers were engaged directly by the Corporation (under s 137 of the ACC Act) rather than through FairWay (undertaking the same statutory function) the only question would be whether the reviewers are undertaking an administrative or judicial function. The fact that the Corporation has engaged FairWay in this regard does not change the Corporation's overarching statutory responsibilities.

This is further evidenced by the Corporation's ability to engage other (and as many) reviewers to carry out the review function as it wishes. Parliament cannot have intended the review function to be treated differently, and subject to different disclosure requirements under the Act, depending on how the Corporation chooses, from time to time, to fulfil its statutory functions in relation to providing for independent merits reviews of its decisions.

The real issue, therefore, is whether or not the reviewers (whether engaged by the Corporation direct or through FairWay) are exercising a judicial or administrative function.

16. Section 2(6) of the OIA provides:

2 Interpretation

...

(6) For the avoidance of doubt, it is hereby declared that the terms **department** and **organisation** do not include—

(b) in relation to its judicial functions, a tribunal; or

(ba) in relation to its judicial functions, a Crown entity within the meaning of the Crown Entities Act 2004;

17. FairWay considers that its reviewers are undertaking a judicial, or quasi-judicial, function. It submits:

- a. *FairWay's reviewers are making decisions pursuant to a statutory and independent review function and process;*
- b. *the decision is to resolve a dispute between two parties;*
- c. *evidence may be provided by either party at that party's discretion;*
- d. *a reviewer must look at the matter afresh, and put aside ACC policy (s 145);*
- e. *the reviewer's determination will have major effect on the claimant in all cases, and potentially also on the Corporation and the way in which it approaches its own decisions on future claims. Review decisions may also lead to costs decisions against the Corporation; and*

f. review decisions may be appealed to the District Court (and further, with leave, on points of law).

18. FairWay further submits that the independence of the reviewer is a key factor in identifying their function as judicial. It refers in that respect to Clifford J's statement in *Willson v ACC and DRSL*:¹

I think the answer to that submission is that if it is not appropriate for ACC to represent the interests of these reviewers, because of the statutory requirement for them to act independently, then neither can it be appropriate for DRSL, ACC's delegate, to represent them either. The scheme of the Act in effect requires them to be as independent of DRSL as it requires them to be of ACC, as DRSL's role is to act in ACC's place.

19. FairWay also refers to the judgment of Beattie J in *Wikeepa v Accident Rehabilitation and Compensation Insurance Corporation*:²

The whole concept of the review procedure is to revisit the issue which is the bone of contention as raised by the claimant and look at it afresh having regard to any new evidence or information which might be pertinent to the particular issue that needs to be determined. I find that the review procedure is more than simply casting an eye over the first instance decision of the Corporation to see whether the particular officer who made the decision got it right.

The review procedure allows for representation by the interested parties, the making of submissions and the giving of evidence and the whole issue which is the subject of the review hearing is alive and the Review Officer who conducts that hearing has the power to substitute his own decision for that which had earlier been made.

20. FairWay also refers to the statement of Young J in *Martin v ACC*:³

... the review and re-hearing appeal will essentially be broader than the Corporation is able to undertake. Ordinarily, the first part of such a process would involve the widest fact finding process and subsequent appeals focus on narrower matters. Here however the statutory regimes... define the Corporation's function. It does so in a way that rightly confines what the Corporation can do. It therefore is to be a merits based review of the conclusion that a claimant is vocationally independent, a wider assessment of the facts is inevitable at the review and appellate level...

¹ High Court, 13 December 2008, CIV-2008-485-1974, [45].

² District Court, 5 May 1998, Decision 109/1998, 6.

³ High Court, 7 August 2009, CIV-2008-485-2617, [35].

21. It is also noted that ACC has its own administrative review that is undertaken prior to instructing a review through FairWay.

22. FairWay further distinguishes other cases:

The High Court in Commissioner or Inland Revenue v B⁴ decision is distinguishable, as the decisions made by review officers in that case were not prescribed by legislation (though of course made through interpretation of the relevant tax/financial Act(s)) and as such the concept of the review officer there was not authorised by law. Here, reviewers specifically act under part 5 of the ACC Act, and independence is specifically prescribed by statute.

The High Court judgment ... did not put in doubt the comment in the District Court decision in that case that 'the review officers are the CIR's agents, not independent bodies required to act independently and judicially in the same way as are reviewer officers under the accident compensation legislation'.

...

The Arbuthnot⁵ decision is in relation to the Benefits Review Committee which has an entirely different statutory and contextual setting.

23. In considering *Creedy v Commissioner of Police*,⁶ FairWay suggests that the context of that judgment and section 12 of the Police Act 1958 is 'very different' to that of the ACC review process:

As noted in our letter, there is an internal ACC administrative review, prior to the independent review and rehearing by the FairWay reviewer. There is then appeal to the District Court. The review process is statutorily independent and reviewers are not carrying out a review 'on behalf' of ACC.

24. FairWay also refers to *Khan v ACC*⁷ as 'not determinative' and considers that references to review in that case are made 'merely in relation to the whole review and appeal process, i.e. that specific appeal remedies are legislated ...'.

Section 9 OIA

25. In the event that the OIA is held to apply to its reviewers, FairWay submits that section 9(2)(b)(i) and (ii) provide good reason to withhold the Benchbook.

⁴ *Commissioner of Inland Revenue v B* [2001] 2 NZLR.

⁵ *Arbuthnot v Chief Executive of the Department of Work and Income* [2008] 1 NZLR 13.

⁶ [2008] 3 NZLR 7.

⁷ High Court, 25 February 2008, CIV-2007-485-001632.

Section 9(2)(b)(i)

26. In relation to section 9(2)(b)(i) of the OIA, FairWay submits:

- a. *While the information in the Benchbook is a compilation of information available in the public domain, the specific compilation and ordering of information has been tailored by FairWay (and is updated) at considerable investment of time and money, and with careful thought as to what amount and level of information would be useful for reviewers to see, and on what topics. It has been designed, compiled and organised, specifically for use by FairWay reviewers. It would take significant work by any third party to recreate Benchbook in any comparable way;*
- b. *Benchbook is subject to FairWay's contractual provisions with its staff and contracted reviewers regarding private and confidential information only being used by FairWay staff/reviewers for professional purposes i.e. solely for the purpose of carrying out their roles;*
- c. *Use of a resource such as Benchbook would normally attract a fee – as do all of the potential comparable alternative resources such as access to and searching of the LexisNexis database.*

Section 9(2)(b)(ii)

27. FairWay also submits that disclosure of the Benchbook would cause prejudice and disadvantage to its commercial provision of independent review services to ACC:

Any former FairWay reviewer or indeed any lawyer could pick up the Benchbook (particularly alongside FairWay's previously disclosed reviewer training manual) and begin to conduct reviews for ACC. This risk is not hypothetical. FairWay is aware that former FairWay reviewers have approached the Corporation with exactly that intent in mind. As FairWay has previously noted, [the requester] is a former FairWay reviewer.

28. It is the compilation and updating of this information that FairWay considers constitutes a significant value. FairWay suggests that if there were no value to the Benchbook, its disclosure would not have been requested:

If third party potential competitors have access to Benchbook (and presumably, updates as they become available), they are more likely to be able to attract reviewers into their service and convince ACC that they are knowledgeable enough and sufficiently equipped to provide an alternative review service in circumstances where they do not have to make any of the financial and resource investment FairWay has made and continues to make to ensure Benchbook is a useful and up-to-date resource for its reviewers. That will prejudice FairWay's commercial activities. Were any private competitor to develop a similar resource, this would not be available to FairWay or the public, giving that competitor a competitive advantage over FairWay going forward.

Section 9(1)

29. In relation to the public interest factors in favour of disclosing the Benchbook, FairWay expresses concern that disclosure of the Benchbook could be perceived as giving legal advice:

... FairWay also has serious reservations about release of Benchbook to the extent it may be taken or perceived as giving legal advice, even in the presence of a specific legal disclaimer. This factor further seriously counteracts any competing public interest in release of Benchbook in our view.

As we have previously noted, it is up to an individual claimant and the Corporation as to how they present their case on review and what case law is relied upon. A party may wish to (and may be better served by) referring to a case that is not contained in Benchbook.

30. FairWay further submits:

We are conscious that your provisional view is focussed on reference to claimants benefitting from disclosure of Benchbook. FairWay does not act for claimants, or any party to a review. As part of its independence FairWay must be neutral. Again, we understand that the review process must be readily accessible, but balanced against this is the fact that it is not directly for FairWay to promote reviews or to provide, or be seen to provide, substantive advice about carrying out any review.

FairWay acknowledges that as its predecessor DRSL was once a subsidiary of ACC, there may remain a perceived issue of independence for FairWay, and therefore it is important that FairWay's processes are fair and transparent. FairWay is of the view however that this transparency is not well achieved through release of the Benchbook.

31. FairWay notes that it is currently 'actively working on alternative solutions to improving the already significant resources it makes available to all parties to a review'. It refers to a section on its website titles 'ACC review case studies', and notes that a link is provided to the ACC appeals decision database through NZLII.⁸

⁸ New Zealand Legal Information Institute.

Analysis and findings

Section 2(6) OIA, 'judicial functions'

32. The relevant section 2(6)(b) and (ba) exemptions of tribunals and Crown entities from coverage under the OIA require that reviewers are undertaking a judicial function when conducting reviews.
33. Both *CIR v B* and *Trapp v Mackie* were considered by the High Court in *Director of Human Rights Proceedings v Catholic Church for New Zealand*.⁹ In that case the Court was considering the issue of whether the Catholic Tribunal, an unincorporated body within the Church, which made decisions on annulment of Catholic marriages, was a 'tribunal' under the Privacy Act. It held that the word 'tribunal' in the definition of 'agency' in s 2(1) of the Privacy Act 1993 referred to bodies with a judicial function, recognised by law and likely to have been created by or pursuant to an Act, and not to non-statutory bodies.
34. While that decision is not authority for saying that review officers cannot be a tribunal, the Court made several observations that appear to be relevant when considering that issue.
35. First, the Court noted that in *CIR v B* Wild J, with the agreement of the parties, did not directly confront the issue of whether the review officer was a 'tribunal'. He had applied the *Trapp v Mackie* tests instead to the question whether the review officer had been acting judicially or administratively.
36. Secondly, the Court observed:

[71] If what might be termed the 'parent' organisation is itself captured by the broad definition of 'agency', it is unclear what justification there might be for isolating out and treating as a separate entity a body set up within that overall entity for the purpose of performing a particular function. There is no doubt that para (a) of the definition of 'agency' would extend to such a body. The defendant's argument has it first being caught by para (a), and then excluded by para (b). Apart from the requirement that that body perform 'judicial functions', expressed in para (b)(viii) of the definition, there would be no other limitation on the ability of the parent body to carve out a segment of its affairs for exemption from the provisions of the Privacy Act. It seems to me that would be wrong as a matter of principle. Further, I cannot see how it can be legally achieved by resort to private rule-making powers. In my view, if the parent organisation is within the definition of 'agency', then so must the entities that it establishes under its aegis, given that they are not separate corporate entities.

⁹ [2008] 3 NZLR 216.

37. Both FairWay and ACC are agencies within the meaning of the Privacy Act. Neither is a tribunal or has judicial functions. FairWay has no statutory authority to appoint reviewers under the ACC Act.
38. Although ACC has a statutory duty to engage reviewers (either on a contract of service or contract for services) and to arrange for the allocation of a reviewer as soon as practicable after receiving an application for a review, I do not accept that in engaging reviewers and allocating applications, ACC can be said to be establishing tribunals having judicial functions.¹⁰ In particular, the fact that the ACC Act contemplates such reviewers being ACC employees, militates against the proposition that in engaging a reviewer ACC is establishing a judicial tribunal performing judicial functions.
39. In *Arbuthnot*¹¹ the Supreme Court held that a Benefit Review Committee (BRC) was a purely administrative body on the grounds that it did not have sufficient independence, since such committees comprised three members, two of whom were appointed by the Chief Executive. ACC reviewers act alone and may be employees. Further, ACC has a statutory duty of allocating claims to them.¹²
40. Although sections 138 and 139 of the Act impose a duty on a reviewer to act independently, and on the Corporation not to allocate a claim to a reviewer who has had any involvement in the claim other than as a reviewer, the statutory link between a reviewer and the ACC under the ACC Act appears to be closer than that of a BRC with the Ministry of Social Development (formerly Department of Work and Income).
41. The fact that reviewers are expressly required to act independently when conducting a review cannot, in my view, affect their statutory status. Such provisions are not uncommon.¹³ In this case it simply means that ACC may not direct or give instructions to its employees or contractors (as the case may be) about the conduct of a review. It does not mean that they are unaccountable to ACC for the way they perform their duties as employees or contractors.
42. I do not consider that ACC (far less FairWay) can determine or change the statutory nature of reviewers' functions by the manner in which it engages reviewers, as this would be to '*carve out a segment of its affairs for exemption from the provisions of the Privacy Act*'.¹⁴ If (as *Arbuthnot* suggests) ACC employees are performing administrative functions in conducting a review, I see no basis for accepting that, by opting not to use employees for that purpose, ACC can transform a reviewer into a tribunal performing judicial functions.

¹⁰ Sections 137, 139 ACC Act.

¹¹ Above n 5.

¹² Section 138.

¹³ *Archives and Records Association of New Zealand v Blakeley* [2000] 1 NZLR 607.

¹⁴ *Director of Human Rights Proceedings v Catholic Church for New Zealand* [2008] 3 NZLR 216, at [71].

43. FairWay also refers to the decision of Clifford J in *Willson v ACC and DRSL*,¹⁵ noting the requirement that the review be undertaken independently, instead of by ACC. Although Clifford J did comment on the requirement that a reviewer act independently, this is insufficient to suggest that a review is judicial or even quasi-judicial. Rather, the Court focused on the role of DRSL under the delegation of ACC and concluded that it could bring no ‘*separate interest*’ to the proceedings, nor speak independently of ACC, and should therefore not be joined as second respondent.
44. I note further that in *Wikeepa v Accident Rehabilitation and Compensation Insurance Corporation*,¹⁶ the Court identified the Review Officer as the person who has the authority to ‘*make a decision on behalf of the Corporation as it affects the claimant and the entitlements of that claimant*’. Beattie J clearly identified that the role of the review under sections 89 and 90 of the Accident Rehabilitation and Compensation Insurance Act 1992 was different in character and purpose to that of the available appeal to the Courts.
45. As to the argument that the relevant provisions (or regime) in the ACC legislation are not analogous to those in the Police Act 1958, the Supreme Court’s decision in *Creedy* simply illustrates that (as acknowledged in *Trapp*) it is not a matter of making an arithmetical analysis of the ‘touchstone’ tests, but of looking at the statutory scheme as a whole.
46. The statutory requirement for reviewers to act independently has been emphasised. As noted above, even in the case of administrative review there is an expectation of independence and impartiality. I also note that:
- a. statutory provisions relating to reviews are located in Part 5, ‘Dispute Resolution’. Reviews are identified as the first step in dispute resolution, prior to recourse to the Courts. An initial administrative review by involved staff does not preclude an intention to offer a further, independent administrative review of the claim;
 - b. although there is an obligation to independently review the decision, the process itself is not independent of ACC. ACC receives and considers the request for a review, and is responsible for the engagement and allocation of a reviewer. Disclosure of relevant information is the responsibility of ACC;
 - c. the reviewer has no power to compel an individual to attend a hearing;
 - d. the reviewer has no power to compel the production of evidence or information;
 - e. although a dispute between adverse parties, the procedure adopted by reviewers is inquisitorial and informal, not adversarial. Parliament has deliberately shifted reviews from an adversarial and court-like process;
 - f. reviewers are directed to avoid legal technicalities, and to structure reviews in a manner conducive to self-representation;

¹⁵ Above, n 1.

¹⁶ District Court, 5 May 1998, Decision 109/98, 6.

- g. strict timelines apply to the reviewer; where a date for the hearing has not been set within three months of ACC having received the application, the reviewer is deemed to have made a decision in favour of the applicant. Such an outcome is not in line with judicial consideration of a matter, and emphasises the close relationship between ACC and reviewers (ie, it is deemed to be a failure for which ACC is accountable for);
 - h. hearings are not conducted in public, and the attendance of observers requires the consent of all parties.
47. In *Creedy*, most of *Trapp* tests would have been satisfied, but it was the statutory scheme of the Police Act that meant the Supreme Court saw the process as an administrative not a judicial one. I remain of the view that the same applies to the ACC legislation and that, however ACC engages its reviewers, it does so to have them carry out an administrative review rather than a judicial function.

Section 9 OIA

48. In light of the above, it follows that I consider the Benchbook official information for the purposes of the OIA, and consideration of FairWay's purported grounds for withholding that information is necessary.
49. Even if I were to accept that reviewers were undertaking judicial functions, the request was made to FairWay, which also holds the information and accepts that it does not itself undertake judicial functions.
50. Although FairWay submits that the Benchbook was developed by reviewers, for the use of reviewers, it is identified in an earlier assessment¹⁷ as information produced internally by a member of staff. It contains FairWay branding, and FairWay has clearly asserted that it owned the Benchbook and holds exclusive rights in regards to its reproduction and distribution. I do not accept that it is information created and held only by reviewers, as distinct from FairWay.

Section 9(2)(b)(i): trade secret

51. The term 'trade secret' within the context of the OIA is concerned with highly secret information capable of indefinite protection. This is separate from those provisions accommodating 'confidential information' (s 9(2)(ba)) and information that would prejudice a commercial position (s 9(2)(b)(i)) or commercial activities (s 9(2)(i)).
52. I do not dispute the effort and cost that may have gone into compiling the Benchbook. However, the document does not contain the necessary degree of secrecy or value to be a trade secret in terms of section 9(2)(b)(i). Although cost would be associated with the use of an online legal database such as LexisNexis, many judgments, including those of

¹⁷ 3 February 2015.

the Accident Compensation Appeal Authority, ACC appeals in the District Court and related High Court, Court of Appeal and Supreme Court judgments, are available online at no cost.¹⁸ As noted earlier, FairWay is considering the use of an alternative such as LexisNexis.

53. The Benchbook contains a series of brief summaries and excerpts of relevant case law. It contains no critical analysis or commentary. Although it may be a time consuming endeavour, it could be replicated. Any copyright or intellectual property value that may attach to the document is not sufficient to establish a trade secret.
54. I conclude that section 9(2)(b)(i) does not apply to the Benchbook.

Section 9(2)(b)(ii): prejudice or disadvantage to commercial position

55. Section 9(2)(b)(ii) of the OIA provides good grounds for withholding information if, and only if:
- disclosure of the information would be likely to prejudice the commercial position of the person who supplied or is the subject of the information;
 - such prejudice would be unreasonable;
 - it is necessary to withhold that information in order to avoid that harm; and
 - there are no countervailing public interest factors in favour of making the information available.
56. Unlike sections 9(2)(i) and 9(2)(k), 'disadvantage' is insufficient for the purposes of section 9(2)(b)(ii). It must be shown that there is a '*real and substantial risk*'¹⁹ of unreasonable prejudice to FairWay's commercial position. An unfavourable outcome is unlikely to meet the standard of 'prejudice'. Disclosure would need to unreasonably impair FairWay's commercial position.²⁰
57. FairWay submits that the likely prejudice to its commercial position is use by potential competitors of the Benchbook in order to:

... attract reviewers into their service and convince ACC that they are knowledgeable enough and sufficiently equipped to provide an alternative review service in circumstances where they do not have to make any of the financial and resource investment FairWay has made and continues to make...

¹⁸ For example: <http://www.nzlii.org/nz/cases/NZACC/>; <http://www.nzlii.org/nz/cases/NZACAA/>. Decisions are available from NZLII, from 1975 to the present day.

¹⁹ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 391.

²⁰ *Kelsey and Ors v Minister of Trade* [2015] NZHC 2497, [120], [142].

58. FairWay refers to previous instances in which former reviewers have approached ACC seeking to conduct reviews, and suggests that recent disclosure of the Reviewers Training Manual is relevant.
59. As noted earlier, but for the unidentified and unsubstantiated reference to past reviewers, there appears to be very little in the way of competition for the provision of review services for ACC. It seems unlikely to me, if copyright and exclusive ownership rights attach to the Benchbook as FairWay suggests, that competitors would provide or reference that document to ACC as an example of their own resources, or that ACC would accept it as such. The document pre-dates FairWay and it seems likely that ACC is well aware of it. Further, FairWay has not explained why such a document — in light of all other factors that would be considered when determining with whom to contract for review services — would be seen by ACC as a significant factor in favour of a particular service provider.
60. However, even if I were to accept that such prejudice would be likely to arise from disclosure of the Benchbook, I am not satisfied that this prejudice could be considered 'unreasonable'. Irrespective of FairWay's profit motives and the provision of other forms of dispute resolution, when providing review services to ACC it is undertaking a public function with significant consequences for the entitlements of individuals under the ACC scheme. The Benchbook itself has its origins with DRSL, while it was a wholly owned subsidiary of ACC.
61. I am not convinced that any prejudice arising from increased competition can be said to be unreasonable. FairWay is engaged by a Crown entity to provide review services, thereby testing the merit of ACC's decision making process, and disclosure would give the public further guidance on the judicial authority reviewers are likely to first refer to. It is information on which a reviewer may rely to form a decision under the authority of legislation.
62. Finally, FairWay's advice that it holds copyright and exclusive ownership rights over the Benchbook also has implications for whether it can be said to be 'necessary' to withhold the information in order to protect the interest contemplated by section 9(2)(b)(ii). If FairWay's concern is that it will suffer commercial prejudice as a result of the unauthorised use of the document, it can — as in the case of ordinary published resources — pursue appropriate legal action to prevent and remedy that. The Benchbook is not in the nature of a trade secret, nor does it contain pricing strategies, costings, or contractual information. It cannot be said that mere disclosure is sufficient to cause harm. Rather, it is the potential for improper use of that information that could cause prejudice to FairWay's commercial position, and this may be addressed by means other than withholding.
63. It follows that there are a number of elements arising from section 9(2)(b)(ii) that are not clearly satisfied in this instance. Where there is uncertainty as to the application of

grounds under section 9(2), the principle of availability²¹ and the purposes of the OIA mean that the information should be disclosed.

Section 9(1): public interest

64. I remain of the view that there are significant public interest factors in favour of disclosing the Benchbook, sufficient to outweigh the protection of an interest that could be established under section 9(2)(b)(ii) of the OIA.
65. Although the Benchbook is not binding on reviewers, it is clearly used as a reference tool and utilised in decision-making. FairWay provides the Benchbook as a resource to the reviewers it engages to undertake informal, investigative and first-stage reviews for claimants, prior to recourse to the courts. Claimants are often not legally represented, and the decisions arising from reviews have significant consequences for their entitlements under a scheme that impacts widely on their health, finances, employment and rehabilitation.
66. Reviews are not public or published. If the Benchbook, which is critical guidance material for reviewers, is kept secret, there is little transparency in relation to the substance and quality of the decisions made by reviewers, or the basis on which they approach issues arising under the ACC Act.
67. As FairWay has identified, there may be a perception that the prior status of FairWay as a subsidiary of ACC leads to bias in decision making. Some reviewers are also former employees of ACC. The disclosure of principled guidance material such as the Benchbook may give some surety as to the independence and competence of reviewers.
68. Beyond transparency, I consider the primary interest in disclosure to be one of accessibility. Regardless of any other commercial endeavours, FairWay is administering a review process for a legislative scheme with wide-ranging public impacts. ACC claimants are often vulnerable individuals, without the resources to engage counsel. The cases outlined in the Benchbook provide important context for the manner in which a reviewer will approach a review. Making it available to claimants (and their advocates) will help inform decisions as to whether an issue should be pursued. This may lead to more targeted reviews and better use of resources.
69. With regard to the suggestion that the public interest would be undermined by the impression that FairWay was providing legal advice on matters in which it is to remain independent, I am not convinced that this is a likely outcome. The Benchbook itself contains case summaries and nothing further. It can be made available with appropriate disclaimers.

²¹ Section 5, OIA.

Ombudsman's final opinion

70. For the reasons set out above, I have concluded that FairWay should not have refused the request. In particular:
- a. FairWay's reviewers are not undertaking judicial functions for the purposes of section 2(6) of the OIA;
 - b. notwithstanding that, the Benchbook is also held by FairWay and it is FairWay, not its reviewers, which asserts ownership of the document;
 - c. the Benchbook is not a trade secret, and section 9(2)(b)(i) of the OIA does not apply;
 - d. disclosure of the Benchbook is not likely to cause unreasonable prejudice to FairWay's commercial position, nor is withholding the Benchbook necessary to protect the interest contemplated by section 9(2)(b)(ii) OIA; and
 - e. public interest factors favour disclosure.

Recommendation

71. I recommend FairWay disclose a copy of the Benchbook to the requester.
72. Under section 32 of the OIA, a public duty to observe an Ombudsman's recommendation is imposed from the commencement of the 21st working day after the date of this recommendation. This public duty applies unless, before that day, the Governor-General, by Order in Council, otherwise directs.

Professor Ron Paterson
Ombudsman

Appendix 1. Relevant statutory provisions

Official Information Act 1982

2 Interpretation

...

- (6) For the avoidance of doubt, it is hereby declared that the terms **department** and **organisation** do not include —
- (a) a court; or
 - (b) in relation to its judicial functions, a tribunal; or
 - (ba) in relation to its judicial functions, a Crown entity within the meaning of the Crown Entities Act 2004;

...

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
 - (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;

Appendix 2. Extracts from Ombudsman's letter of 11 November 2015

... FairWay is subject to the Ombudsmen's jurisdiction under the Ombudsmen Act 1975 and the OIA by virtue of Schedule 1, Part 2 of the Ombudsmen Act which lists '*Companies named in Schedule 4A of the Public Finance Act 1989*'.

Although FairWay is not listed under that name in Schedule 4A of the Public Finance Act, which relates to '*Non-listed companies in which Crown is majority or sole shareholder*', but under its former name, Dispute Resolution Services Ltd ('DRSL'), section 23(4) of the Companies Act 1993 makes it clear that a change of name does not affect the jurisdictional position by preserving the company's rights and obligations. As a result, FairWay falls within the definition of '*organisation*' in section 2(1) of the OIA.

...

I acknowledge that FairWay's original incarnation (under the name Dispute Resolution Services Ltd) was as a wholly owned subsidiary of the ACC. This made it a Crown entity (which meant that section 2(6)(b) could apply if it had '*judicial functions*'). However, the Public Finance Amendment Act 2013 changed FairWay's status on 18 July 2013, from a Crown entity to a company named in Schedule 4A of the Public Finance Act 1989. Such companies are not Crown entities and consequently, if not a court or tribunal, none of the other possible exclusions relating to '*judicial functions*' in section 2(6) of the OIA can apply.

Further, even as a Crown entity, I do not consider that FairWay is performing '*judicial functions*' (whether within the meaning of the OIA or otherwise), despite the Privacy Commissioner's views on that issue under the Privacy Act 1993.

It is evident from the Schedules to the Crown Entities Act 2004 that not all Crown entities perform '*judicial functions*'. If it had been intended that FairWay perform such functions, its change of status should have resulted in specifying that section 2(6) of the OIA applied to it. However, no such legislative provision is made for any of the companies named in Schedule 4A of the Public Finance Act 1989. The legislation is consistent with such companies *not* having such functions.

Further, without express legislative authority, I am not persuaded that FairWay could have judicial, or even quasi-judicial, functions.

In *Just One Life Ltd v Queenstown Lakes District Council*,²² the Queenstown Lakes District Council had purported to delegate its functions, powers and duties under the Resource Management Act 1991 ('the RMA') to Civic Corporation Ltd ('Civic'). Pursuant to that delegation, Civic had exercised the Council's powers as consent authority and granted a resource consent.

²² *Just One Life Ltd v Queenstown Lakes District Council* [2004] 3 NZLR 226.

The Court of Appeal, in holding that the Council’s judicial powers under the RMA could not lawfully be delegated to Civic, observed:

We attach particular significance to the restriction on subdelegation of functions in s 34(4)(d) because a judicial power cannot be exercised by an inanimate entity such as a company other than through the company’s officers, employees or agents and that could not happen unless the company subdelegated the power to an officer, agent or employee. (emphasis added)

The Court further held that only a natural person could be an officer of the Council so Civic could not have had the power delegated to it in that capacity.

In the present case, the Accident Compensation Corporation (‘ACC’) has the statutory obligation under section 137 of the AC Act to engage reviewers. If FairWay has been engaged by ACC to engage reviewers, it is performing an administrative task. In this respect it may be noted that in *Aalderink v Accident Compensation Corporation*²³ the Court referred to the reviewer expressly as ‘the Accident Compensation Corporation’s Reviewer’.

It would appear to follow that FairWay has no review function of any kind (whether judicial or not) either under the Accident Compensation Act or by delegation from ACC. Its role appears to be limited to that of engaging ACC reviewers, whether as ACC’s agent or under delegation.

As for the review function itself, it appears to be not dissimilar to other instances where reviews of administrative decisions are provided for by legislation and where the Courts have found that the reviewer was performing an administrative function. I note the following examples:

- In *Commissioner of Inland Revenue v B*²⁴ the High Court held that in determining an application for a departure order under Part 6A of the Child Support Act the Commissioner, and the review officer with delegated power, was performing an administrative, not a judicial, function, and was not acting as a tribunal.
- In *Arbuthnot v Chief Executive of the Department of Work and Income*,²⁵ where a review had been conducted by a Benefit Review Committee (established by the Minister under section 10A of the Social Security Act 1964) the Supreme Court held that such a Committee was a purely administrative body acting in the place of the Chief Executive and its decision was a Departmental decision.
- In *Creedy v Commissioner of Police*²⁶ the Supreme Court held that an inquiry under section 12 of the then Police Act 1958 was an administrative procedure carried out on behalf of the Commissioner to assist the Commissioner as the employer in terms of

²³ *Aalderink v Accident Compensation Corporation* [2015] NZHC 163.

²⁴ Above, n 4.

²⁵ Above, n 5.

²⁶ Above, n 6.

section 5(5) and to give Police the right to a fairly conducted inquiry into any allegations of misconduct.

Of these decisions, Creedy is particularly pertinent in the present context. Section 12 of the Police Act provided:

12 Inquiry into misconduct

- (1) *Where any misconduct or neglect of duty is alleged against any sworn member of the Police, the Commissioner may appoint one or more persons to inquire into the alleged misconduct or neglect of duty and to report to the Commissioner on that matter.*
- (2) *Where such an allegation is made against any sworn member of the Police, the Commissioner may suspend the member from duty under section 32 of this Act, but shall not take any other action against that member in respect of a matter being investigated under this section until the Commissioner has considered the report to be provided under this section.*
- (3) *The person or persons holding the inquiry shall—*
 - (a) *Take all reasonable steps to ensure that the member against whom the allegation is made is given notice of the reasons for the inquiry; and*
 - (b) *Give the member or his or her counsel or agent a reasonable opportunity to make submissions and be heard in respect of the allegation.*
- (4) *The person or persons holding the inquiry shall follow the procedure prescribed in regulations made under section 64 of this Act, but may receive any relevant information whether or not the same information would be admissible in a Court of law.*
- (5) *For the purposes of this section the person or persons holding any such inquiry shall have the same powers and authority to summon witnesses and receive evidence as are conferred upon Commissions of Inquiry by the Commissions of Inquiry Act 1908, and the provisions of that Act, except sections 11 and 12 (which relate to costs), shall apply accordingly.*
- (6) *No person shall be called upon to produce any paper, document, record, or thing, or give any evidence if the Minister certifies in writing that to do so would be injurious to the public interest or the interests of the Police.*
- (7) *So long as any person engaged in any inquiry under this section acts bona fide in the discharge of that person's duties, no action shall lie against that person for anything that he or she may report or say in the course of the inquiry.*
- (8) *Every witness attending and giving evidence and every counsel or agent appearing at any inquiry under this section shall have the same privileges and immunities as witnesses and counsel in Courts of law.*

- (9) *Where the allegation under inquiry involves 2 or more sworn members of the Police, the person or persons holding the inquiry may hear the cases together.*

Despite the formality associated with such an inquiry (which the Police Regulations 1992 required be aligned with District Court summary criminal procedure, with a reference to the person(s) conducting the inquiry as a 'Tribunal') the Supreme Court had no difficulty in concluding that such an inquiry was an administrative, not a judicial, one. The Court, having examined the relevant statutory provisions and their history, observed:

Looking at these provisions as a whole, the inference is inescapable that police officers facing allegations of misconduct were intended to have the protection of, first, a s 12 inquiry and, secondly, resort to the personal grievance procedure.

The history of the ACC legislation appears similarly to be one where an initial administrative review of a decision was intended to be available to a claimant before there would be any appeal to a judicial body (such as a District Court).

In *Khan (Youmna) v Accident Compensation Corporation*,²⁷ (an appeal against a District Court decision that it had no jurisdiction to recall its own decision) the High Court considered certain provisions regarding the appeal procedures available to dissatisfied claimants under forerunners of the current Accident Compensation Act. Speaking of the Accident Rehabilitation and Compensation Insurance Act 1992, the Court observed:

Section 89(1) of the ARCI Act provided that any claimant who is dissatisfied with a decision of the Corporation could apply to the Corporation for a review of the decision.

[41] Section 90(1) required the Corporation to appoint persons to hear each review, directing that the reviewing person must act independently in conducting the hearing. From the decision on the review, there was a right of appeal to the District Court against any decision under s 90 of the Act. Section 91 itself contained various procedural provisions in relation to appeals, some of which were repeated in the ARCI Regulations. Section 91(8) empowered the District Court to confirm, modify or revoke the decision appealed against, or to dismiss the appeal.

This extensive statutory regime providing for an initial decision, a review, a full re-hearing in the District Court followed by appeals to the High Court and the Court of Appeal.

Given the Supreme Court's decision in *Creedy*, (as well as the other cases cited above), the provisions in the Accident Compensation Act and the history attaching to the review right, a similar conclusion to that arrived at in *Creedy*, appears inescapable, ie. that an ACC review would be held to be an administrative, not a judicial, matter.

²⁷ *Khan (Youmna) v Accident Compensation Corporation* [2014] NZAR 1297.