

Request for document related to coalition negotiations between Labour and New Zealand First

Minister	Prime Minister Jacinda Ardern
Request for	Information relating to coalition negotiations between the Labour Party and New Zealand First
Ombudsman	Chief Ombudsman Peter Boshier
Case number(s)	467651 and 467523
Date	14 December 2017

Summary

Two complaints were received under the Official Information Act 1982 (OIA), about the decision by the Prime Minister, the Rt Hon Jacinda Ardern, not to release certain information relating to the coalition negotiations between the Labour Party and New Zealand First. The Prime Minister considered that the requested document did not contain ‘*official information*’ held in her capacity as Prime Minister.

The Chief Ombudsman reviewed a full copy of the document in question. He also sought an explanation from the Prime Minister’s Office about the generation and any subsequent use of the document, and met with her officials to discuss the Prime Minister’s decision. The Chief Ombudsman also consulted with the Deputy Prime Minister, the Rt Hon Winston Peters, about the information.

After careful consideration of the document in question, comments by the Prime Minister’s Office and the Deputy Prime Minister, and comments by the complainants, the Chief Ombudsman formed the opinion that the information requested was not ‘*official information*’ held by Ms Ardern in her official capacity as Prime Minister. The information within the document had not formed a part of the final coalition agreement concerning the formation of a new government, and had not been used by Ministers since the government was formed. The Chief Ombudsman therefore considered that the document was still held by Ms Ardern in her capacity as Labour Party Leader, and not subject to the OIA.

Complaints

1. The complainants raised concerns with me about the Prime Minister, the Rt Hon Jacinda Ardern's decision not to release the document to the requesters as she considered that it did not contain '*official information*' for the purposes of the OIA.
2. The Prime Minister's Office considered that the information contained in the document was not information '*held*' by the Prime Minister in her '*official capacity*' as a Minister of the Crown (section 2(1) of the OIA refers).
3. The complainants noted public comments by the Deputy Prime Minister, the Rt Hon Winston Peters, that the document in question contained '*directives to Ministers*'.¹ This, they contended, brought some or all of the information at issue within the ambit of '*official information*'.

Investigation

4. On 29 November 2017, I notified the Prime Minister of my intention to investigate these complaints and to review her decision on the requests. I sought a copy of the information at issue, together with an explanation of the reasons for that decision.
5. The Prime Minister's Office subsequently provided me with its comments and her staff met with me to discuss the contents of the requested document and to explain the context in which it was generated and held. I was provided with the full copy of the document so that I might read and consider the information at issue.
6. On 8 December, I advised the complainants of my provisional opinion on their complaints. I invited them to provide comments for me to consider before forming my final opinion. Both complainants provided comments, which were considered when forming this opinion.
7. Having regard to the complainant's comments on my provisional opinion, I decided to also consult with the Deputy Prime Minister before forming my final opinion. I sought information from Mr Peters about how the information was created, whether the information has been used in his official capacity, whether it contains any directives to Ministers or similar information and how it has been stored.

Analysis

8. It is uncontested that Ms Ardern had in her possession, at the relevant times, a copy of the document. The first question for me to determine was whether that document

¹ Newsroom. 'Kiwis left in dark over minister's directive' 27 November 2017. Retrieved from <https://pro.newsroom.co.nz/articles/2273-kiwis-left-in-dark-over-ministers-directives>

contained information which, at the time of the requests, was ‘official information’ within the meaning of the OIA.

9. I observe, as a starting point, that ‘official information’ is defined in section 2(1) of the OIA as including any information held by a Minister of the Crown ‘in his [or her] official capacity’.
10. It is important to note that individuals who are Ministers of the Crown can hold information while acting in a number of capacities. I refer to my Office’s guide *The OIA for Ministers and agencies*,² which observes that Ministers of the Crown can hold information that is not ‘official information’ because it is held in their:
 - a. private capacity;
 - b. capacity as an Member of Parliament (e.g. electorate information); or
 - c. capacity as a member of a political party (e.g. caucus information).
11. Information which is held in these other capacities may become ‘official information’ only if it is subsequently used for official Ministerial purposes.
12. When former Chief Ombudsman John Belgrave considered a very similar complaint relating to a request for the 2005 coalition negotiation documents of the Fifth Labour Government, he observed that there were four key considerations when determining whether such information is or has become ‘official information’. The Prime Minister, and Ombudsman on review, must consider:
 - a. the purpose of the information;
 - b. the nature and content of the information;
 - c. the context in which it came to be held; and
 - d. the use to which it has been put.
13. Having regard to those factors, Mr Belgrave reached the conclusion in that case that the information created in the course of the 2005 coalition negotiations was not official information.
14. I consider these factors are also applicable in the complaints currently under my investigation and review.
15. In this case, the Prime Minister’s Office has advised me that the information at issue was created in the course of coalition negotiations between the New Zealand Labour and New Zealand First parties. The information was created for the purpose of raising various points to facilitate negotiations between the two political parties, prior to the final

² Office of the Ombudsman ‘The OIA for Ministers and agencies’ June 2016. Retrieved on 29 November 2016 from http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/1605/original/the_oia_for_agencies.doc.pdf?1466730917 at page 7

coalition agreement being signed and the formation of the government on 26 October 2017.

16. I understand that, although the information at issue was considered during the coalition negotiations, this document did not form part of the final coalition agreement ultimately reached. The coalition agreement itself has since been released publicly by Ms Ardern, notably acting in her capacity as the Leader of the Labour Party.
17. I have read and considered the contents of the document. It was clearly made for the purpose of assisting the parties with coalition negotiations. It contains discussion points designed for negotiation and, despite certain public comments to the contrary, does not include information such as directives to Ministers.
18. It is also clear that the document was created prior to the coalition agreement and therefore before the formation of the government. It follows that the information, when it was created, was capable of being held by Ms Ardern only in her capacity as Leader of the New Zealand Labour Party. The contents of the document therefore were clearly not '*official information*' at that time.
19. As the information was not official information when it was generated, for it to become official information and subject to request under the OIA, it would need to have been used by Ms Ardern, or any other Ministers of the newly formed government, in their official capacity.
20. I have asked the Prime Minister's Office whether the information has been used since the formation of the new government, and whether the contents of the document has been shared with any Ministers of the Crown, government departments, or other persons or entities subject to the OIA.
21. The Prime Minister's Office has advised that the requested document has not been passed on to any such persons or entities. While the document was used in the course of coalition negotiations, it has not been used by any Minister of the Crown to carry out official duties. It has played no part in policy decisions, and is not available to Ministers as reference material when making official decisions.
22. As public comments from the Deputy Prime Minister appeared to infer that the document may have contained information which has been used by Ministers in their official capacity, I also consulted with the Deputy Prime Minister on these questions.
23. The Deputy Prime Minister advised that the information was created during coalition negotiations for discussion between the parties, and that it did not form part of the agreement that was reached. Mr Peters confirmed to me that the information does not contain any guidance or directives to Ministers as to how to carry out their roles, and that he has not used the information in any way in his official capacity as Deputy Prime Minister.
24. Therefore, having considered the Prime Minister's Office's comments and the nature and purpose of the document, I am satisfied that the information has not been used by Ms

Ardern in her official capacity as Prime Minister, nor other persons in their official capacity. I accept that the document is held solely in her capacity as Leader of the New Zealand Labour Party.

25. As a result, I am satisfied that that its contents have not become '*official information*'.

Chief Ombudsman's opinion

26. I am of the opinion that the Prime Minister was entitled to refuse the requests on the basis that the information requested was not official information.

Appendix 1. Relevant statutory provision

Official Information Act 1982

2 Interpretation

(1) In this Act, unless the context otherwise requires,—

official information—

(a) means any information held by—

- (i) a department; or
- (ii) a Minister of the Crown in his official capacity; or
- (iii) an organisation;