

## Request for information in relation to overseas acquisition of property in Northland

<b>Legislation</b>	Official Information Act 1982 - ss 9(2)(a), (ba)(i), (b)(ii), (g)(i) and (h)
<b>Agency</b>	Land Information New Zealand – Overseas Investment Office
<b>Ombudsman</b>	Leo Donnelly
<b>Case number(s)</b>	462024
<b>Date</b>	29/03/2018

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### Summary

The National Business Review (NBR) asked the Overseas Investment Office (OIO) for copies of all relevant decision documents in relation to André and Malgorzata Calantzopoulos's acquisition of property in Northland. NBR complained to the Ombudsman after the OIO withheld information concerning the assessment of whether the applicants were of 'good character'. The information withheld fell into two categories, being details of the 'good character allegations' which were considered in the application, and legal advice on the interpretation of the 'good character test'.

The Ombudsman formed the provisional opinion that the request should not have been refused. For the 'good character allegations', the Ombudsman considered that the release of the information would not unreasonably prejudice the commercial position of those involved or infringe on their privacy, nor that it would prejudice the future supply of similar information.

In relation to the legal advice, the Ombudsman considered that while the relevant withholding ground applied, the need to maintain legal professional privilege in this case was outweighed by the high public interest in accountability and transparency in decision making, as well as public participation in the wider issue of overseas investment in land.

The OIO accepted the Ombudsman's provisional opinion, and the Attorney-General decided to waive legal privilege in the information. The information was released to NBR and the Ombudsman therefore discontinued his investigation as the complaint was resolved.

## Background

1. Mr and Mrs Calantzopoulos applied to OIO for and, in 2017, were granted permission to purchase property in Northland.
2. Before an application for the purchase of sensitive land in New Zealand may be granted, section 16(c) of the Overseas Investment Act 2005 requires the relevant Ministers to be satisfied that the applicants are, among other criteria, of *'good character'*.
3. The NBR requested all relevant decision documents in relation to the application to the OIO. The NBR was provided with redacted copies of the advice to the then Minister for Land Information and Associate Minister of Finance, as well as the *'notice of decision'*.
4. The NBR made a complaint to the Ombudsman about the redactions made to the sections of these documents in relation to the OIO's assessment of whether the applicants were of *'good character'*. This information fell into two categories:
  - a. Information concerning allegations considered when assessing whether the applicants were of *'good character'*; and
  - b. Legal advice on the interpretation of the *'good character test'*.

## Investigation

### **Analysis of the OIO's withholding of *'good character allegations'***

5. In relation to the *'good character allegations'*, the OIO considered that the information should be withheld:
  - a. under section 9(2)(b)(ii) of the Official Information Act (OIA), as release of the information would be likely unreasonable to prejudice Phillip Morris Companies Inc.'s (Phillip Morris's) commercial position;
  - b. under section 9(2)(ba)(i) of the OIA, as:
    - i. Mr Calantzopoulos was compelled to provide this information to the OIO under the Overseas Investment Act 2005, to allow the decision-maker to *'determine if he is of good character'*;
    - ii. it is in the public interest that the OIO receive all information which is relevant to an application in a full and open manner so that it can conduct efficient and comprehensive assessments of that application; and
    - iii. release of this information would be likely to prejudice the future supply of similar information to the OIO, as there would be a real risk that future applicants would be wary about providing the OIO with information *'which may be detrimental to their reputation if there was a likelihood of it being publicly released'*.

6. The OIO also consulted with the Calantzopoulos' lawyer, to seek their view on the release of this information. He considered that the allegations should also be withheld under sections 9(2)(a) and 9(2)(b)(ii) of the OIA.

### Application of section 9(2)(b)(ii) – prejudice to commercial position

7. Section 9(2)(b)(ii) of the OIA provides good reason for withholding information '*if, and only if,*' it is '*necessary*' to protect information where the making available of that information would be likely unreasonably to prejudice the commercial position of the person who supplied or is subject of the information.
8. The OIO considered that the release of the allegations '*together in a single document*' would unreasonably prejudice the commercial position of Philip Morris, and that competitors may use this to adversely affect Phillip Morris's reputation.
9. The information at issue consists of a table, and a corresponding summary, of five allegations made about Phillip Morris. This information about the allegations is publicly available, and can be obtained through various searches on the internet.
10. The Ombudsman accepted that details of the allegations themselves may well have been commercially prejudicial to Phillip Morris at some time in the past. However, the allegations are now publicly available and there has been significant public commentary on the various matters over time. Many of the allegations are historic, with the earliest allegation relating to activities in 2003/2004.
11. The Ombudsman therefore did not consider that the release of this information at the time of the OIO's decision, and in this context, would further prejudice Phillip Morris's commercial position. Competitors were already able to use the publicly available information about Phillip Morris, and have been able to for some time.
12. The Calantzopoulos' lawyer also raised concerns that the release of the information would prejudice his client's commercial position. In particular, he was concerned that the release of this information would prejudice the ability of his clients to carry out business ventures and seek job opportunities in New Zealand, where they planned to move.
13. The Ombudsman, however, was not persuaded that this would be an '*unreasonable*' prejudice to their commercial position. The allegations were publicly available at the relevant times, and Mr Calantzopoulos' history of work with Philip Morris International is well known.<sup>1</sup> It is also clear from the information already released in response to the request that the OIO had considered the '*allegations*' against Philip Morris and its subsidiaries when assessing the '*good character*' criteria. This was a clear signal to the public that there had been allegations against Philip Morris which could then be searched. This type of search would reasonably be expected in any future employment or business situation for Mr Calantzopoulos, regardless of whether the information was released by the OIO under the OIA.

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<sup>1</sup> See [https://en.wikipedia.org/wiki/Andr%C3%A9\\_Calantzopoulos](https://en.wikipedia.org/wiki/Andr%C3%A9_Calantzopoulos)

14. The Ombudsman also observed that the allegations detailed in the documents are worded in a way to clearly show that they are directed at the various iterations of Philip Morris rather than Mr and Mrs Calantzopoulos. The information already released to the requester also comments on Mr Calantzopoulos' statutory declaration that he was not directly involved with *'the relevant entities or their decisions in relation to the allegations'*. The information released then goes on to detail why the OIO was satisfied about this.
15. The Ombudsman did not accept that the release of this information would be likely to prejudice *'unreasonably'* the commercial positions of Mr and Mrs Calantzopoulos, given that the allegations and Mr Calantzopoulos' employment at an executive level are publicly known, and that the information already released explains why the OIO accepted that Mr Calantzopoulos was not tied to these allegations.
16. The Ombudsman therefore did not consider that 9(2)(b)(ii) of the OIA applied to this information.

#### Application of section 9(2)(ba)(i) – prejudice to future supply of information

17. Section 9(2)(ba)(i) of the OIA provides good reason for withholding information if it is necessary to protect information which is subject to an obligation of confidence, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied.
18. The OIO also considered that the request caught information that Mr Calantzopoulos was compelled to provide under the Overseas Investment Act in order for the OIO to determine whether he is of good character.
19. The Ombudsman accepted that it is in the public interest that the OIO receives relevant information in a full and open manner in order to assess applications effectively. In this case, however, he did not consider that the release of this information would prejudice the supply of similar information to the OIO in the future.
20. It is clearly the applicant's responsibility to satisfy the OIO that they meet the *'good character'* test. An applicant knows that the OIO is subject to the OIA, and there have been previous high profiles cases where *'good character'* allegations have been released.
21. The OIO's factsheet on the good character test states that:<sup>2</sup>
  - a. applicants *'must identify and disclose all information potentially relevant'* in the application;
  - b. the OIO *'will undertake our own background checks to help ensure that all potentially relevant information has been disclosed and addressed'*; and

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<sup>2</sup> <https://www.linz.govt.nz/regulatory/overseas-investment/applying-for-consent-purchase-new-zealand-assets/preparing-your-application-oio/investor-test/good-character>

- c. if information submitted is *'incomplete, unreliable or otherwise inadequate it is likely that we will return your application'* which *'may also cast doubt on the quality of your application and prompt further enquiries and more intensive background checks'*.
22. It was therefore clear that an applicant must provide sufficient information to satisfy the OIO that they are of good character before their application could have any realistic chance of success, and that omitting relevant information could be detrimental to their chances.
23. The nature of the relationship between an applicant and the OIO does not suggest that there would be an inhibition in providing further information, given that an applicant must satisfy the OIO of these requirements, and it is known that the OIO will undertake its own enquiries. This relationship remains regardless of whether information is released. The Ombudsman therefore did not accept that the release of these allegations, particularly as they are publicly available in this case, would be likely to prejudice the supply of similar information for future applications.
24. Consequently, the Ombudsman did not consider that section 9(2)(ba)(ii) applied to this information.

#### Application of section 9(2)(a) – privacy

25. While the OIO did not rely on section 9(2)(a) of the OIA to refuse the information, Mr and Mrs Calantzopoulos' lawyer submitted to the OIO that this section applied. The Ombudsman therefore considered its application in these circumstances.
26. It was submitted that the release of the information would interfere with the applicants' privacy as it would create a negative perception of them, and that any such perception would be unjustified.
27. In this case, the information withheld reveals details of allegations against various Philip Morris companies, and not against Mr Calantzopoulos himself. Mr Calantzopoulos' name does not appear in the allegations.
28. The only relationship between the information at issue and Mr Calantzopoulos concerns his position as Chief Executive Officer of Philip Morris International, which is public knowledge. The information does not reveal anything about Mr Calantzopoulos in his personal capacity additional to the information that is already publicly available.
29. While Mr and Mrs Calantzopoulos may receive additional attention from the New Zealand media were this information released, the matter has already been traversed in the media. The Ombudsman considered that any additional interference with their privacy would be minimal and carry little weight.
30. The Ombudsman also noted that Mr and Mrs Calantzopoulos purchased property in New Zealand in full knowledge that such a purchase could attract media attention, given the importance placed on New Zealand and previous high profile cases which have attracted attention. As a high ranking figure of a large international company which has

drawn criticism in the media, this was surely a factor which they would have been aware of when making the application.

31. The Ombudsman therefore considered that any interference with the Calantzopoulos privacy from the release of this particular information is not sufficient to make it necessary to withhold the information for the purposes of section 9(2)(a) of the OIA.

### **Analysis of withholding of legal advice**

32. In relation to the legal advice that was withheld under section 9(2)(h), the OIO considered that 9(2)(h) applied to the information as:
- a. it is generally not normal practice for the Regulator to brief the decision maker on how to interpret particular sections of the Overseas Investment Act, but in this case a conscious decision was made to separate legal advice as an appendix to advise the decision maker; and
  - b. the advice was prepared by an OIO staff member who has a current practicing certificate as a lawyer, for the purpose of advising on provisions of the Act which have attracted differing views.
33. The OIO also considered that section 9(2)(g)(i) provides good reason to withhold this information. The OIO submitted that the opinions expressed were free and frank in nature and that release of the information would be likely to inhibit the future expression of such opinions. The OIO contended that this would result in the decision maker under the Overseas Investment Act not having the advantage of having received candid advice on the *'sometimes complex statutory provisions'* of that Act.

### **Application of 9(2)(h) – legal professional privilege**

34. Section 9(2)(h) of the OIA applies where withholding of the information is necessary to maintain legal professional privilege. The question in this case is whether the information contained within Appendix 3 of the report to the Minister was legally privileged under solicitor-client privilege.
35. Former Ombudsman Ron Paterson considered a similar complaint in May 2015 concerning advice provided to the Minister on an application by Kim Dotcom for the purchase of sensitive land.<sup>3</sup> In that case, Professor Paterson was of the opinion that the author of the advice was not providing the advice as a lawyer, but rather in the role as the *'regulator'* under the Overseas Investment Act. Professor Paterson was therefore not persuaded that legal professional privilege attached to the information at issue.
36. Professor Paterson's case note at [33] states:

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<sup>3</sup> See [http://www.ombudsman.parliament.nz/system/paperclip/document\\_files/document\\_files/971/original/request\\_for\\_advice\\_to\\_ministers\\_on\\_applications\\_under\\_the\\_overseas\\_investment\\_act.pdf?1432757081](http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/971/original/request_for_advice_to_ministers_on_applications_under_the_overseas_investment_act.pdf?1432757081)

*The OIO is designated the ‘regulator’ under the Overseas Investment Act. One of the regulator’s functions is to ‘consider each application and advise the relevant Minister or Ministers on how the application should be determined’. That appeared to have been the purpose for which the memoranda at issue was brought into existence. They contained the OIO’s advice on Mr Dotcom’s application and recommendations as to who that application should be determined. They contained phrases such as ‘the OIO is satisfied that...’ ... The memoranda was signed off by the Manager of the OIO. The Ombudsman considered that that was the capacity in which she was acting, notwithstanding the fact that she also possessed specialist legal skills.*

37. Professor Paterson did not say that advice provided by a regulator can never be legally privileged but he considered that, in that case, it had not been ‘*demonstrated affirmatively*’ in that case that the advisor in question was acting in a legal capacity.
38. Having carefully reviewed this case, it was clear that the OIO has changed its practice since Professor Paterson’s investigation. The information in question was separated from the body of the advice on the application, clearly marked with a heading of ‘*legal advice – privileged*’, and authored by an OIO lawyer separate to the main author of the regulatory advice on the application. The OIO also advised that:

*...it is generally not normal practice for the Regulator to brief the decision maker on how particular sections of the Overseas Investment Act should be interpreted. In relation to the OIO report on the application for consent by [Mr and Mrs Calantzopoulos] there was a conscious decision to separate legal advice into a separate appendix (Appendix 3), rather than have that advice form part of the substantive report. The advice regarding the ‘good character’ test is derived from legal advice prepared by the Office’s legal staff.*

39. In determining whether the advice is subject to legal professional privilege, the Ombudsman considered whether:
- a. the author was a lawyer holding a current practising certificate;
  - b. the author was acting in a legal capacity or some other executive or administrative capacity;
  - c. the advice was given in the nature of a solicitor-client relationship;
  - d. the information was brought into existence for the purpose of giving legal advice; and
  - e. the information was in the nature of legal advice.
40. The author of the legal advice sections was a senior solicitor working in the OIO who had a current practising certificate. The information is in the nature of advice on the application of the law (being sections 16 and 19 of Overseas Investment Act).
41. An important consideration in this case is whether the solicitor was acting in their legal capacity. As Professor Paterson set out in his previous investigation:

*In the case of 'in-house' lawyers (legal practitioners employed within agencies), particularly ones employed in roles that are not strictly or solely legal in nature, it must be 'demonstrated affirmatively' that they have been acting as a lawyer and not simply as an employee possessing specialist skills (see Miller v Commissioner of Inland Revenue [1999] 1 NZLR 275 at 296).*

42. The advice in this case was focused solely on how the law can be interpreted for this application, but did not draw conclusions on the application as a whole. The advice was not in the nature of the OIO advising the Minister in its role as the regulator, rather it appears to have been presented as direct legal advice on the legal aspects of the 'good character' test. This view was supported by the OIO's comment that this type of advice is not generally included in similar reports of this kind.
43. In the circumstances, the Ombudsman was satisfied that the information withheld was legal advice, generated by the official in their role as a senior solicitor. The Ombudsman therefore considered that section 9(2)(h) applied to the information.

#### Application of 9(2)(g)(i) – free and frank

44. Section 9(2)(g)(i) of the OIA provides good reason for withholding information if it is necessary to maintain the effective conduct of public affairs through:

*The free and frank expression of opinions by or between or to Ministers of the Crown... or officers and employees of any department or organisation in the course of their duty.*

45. The section does not protect free and frank opinions per se. It is about maintaining the effective conduct of public affairs through the free and frank expression of opinions. There must be some reason to believe release would prejudice the future expression of free and frank opinions which are necessary for the effective conduct of public affairs.
46. The information that had been withheld is presented as legal advice to the Minister by an OIO staff member, in their role as a lawyer. It sets out an interpretation of the good character legal test and how 'good character' can be demonstrated.
47. The Ombudsman did not see that legal advice can, by its very nature, be withheld under section 9(2)(g)(i). Practising lawyers are required to adhere to professional obligations to act according to instruction.<sup>4</sup> The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 sets out in the Schedule that a lawyer must 'act competently, in a timely way, and in accordance with instructions received and arrangements made'. The Ombudsman therefore could not see how disclosure of a lawyer's legal opinion would inhibit future expressions of free and frank opinion material, given that any reluctance by a lawyer to provide written advice upon instruction would appear to fall short of meeting their professional obligations.

48. The Ombudsman therefore considered that section 9(2)(g)(i) did not apply to the information.

### Public interest considerations favouring disclosure

49. Having accepted that section 9(2)(h) applies to this information, the Ombudsman then considered 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) refers).
50. In this regard, Parliament has determined that the interest in maintaining legal professional privilege is not absolute. If this had been intended, the reason for withholding information to maintain legal professional privilege would have been enacted in section 6, which is not subject to any countervailing public interest test. Parliament determined that the interest in maintaining legal professional privilege should be weighed, in each case, against any countervailing considerations favouring disclosure in the public interest. If the considerations favouring disclosure outweighed the interest in maintaining legal professional privilege then the information should be made available consistent with the principle of availability in section 5 of the OIA and the purposes of the legislation set out in section 4.
51. The Ombudsman have long recognised the strength of the interest in maintaining legal professional privilege. Therefore, any countervailing public interest must be strong enough to outweigh this well recognised interest.
52. There is clearly a great deal of interest in the issue of the purchasing of property by parties who are not from New Zealand. It was a key issue in the 2017 General Election, and the resulting government has stated its intention to change the scheme of the Overseas Investment Act and put in place a ban on foreign land purchases.
53. Section 16(1)(c) of the Overseas Investment Act requires that the responsible Ministers are satisfied that the overseas applicant is of good character. Section 19(1)(b) further provides that the Ministers must take into account *'any other matter that reflects adversely on the person's fitness to have the particular overseas investment'*.
54. The responsible Ministers therefore have a broad discretion to take into account matters when determining if an applicant is of good character. It is not straightforward as to what matters would be taken into account in each application.
55. The allegations were clearly relevant to the application in this case, and were taken into account when advising the Ministers as to whether the applicants were of good character. The legal advice on how the test can be interpreted is vital to understanding how the OIO reached its recommendation that consent be granted in this case. While the OIO has released its analysis of Mr Calantzopoulos' character, the Ombudsman considered that the public would not be able to hold the Ministers and relevant officials fully to account for their decisions and recommendations in this case without being able to see the details of the allegations or the legal advice which guided the Ministers on how the test should be interpreted (section 4(a)(ii) of the OIA refers).

56. Consequently, the Ombudsman considered that there was a strong public interest in the accountability of officials for the advice that is provided to Ministers, as well as ensuring sufficient transparency to show that the Ministers' broad discretion under sections 16 and 19 of the Overseas Investment Act was exercised in a fair and reasonable way, on a proper basis, and without inappropriate factors or considerations being taken into account. The question of whether Mr Calantzopoulos was of good character was a key consideration for this application, and serious allegations were a part of that consideration. Without the disclosure of the information at issue in this case, the Ombudsman considered that it would be difficult for the public to understand how the officials and Minister reached their conclusions in this case.
57. Additionally, the Ombudsman agreed with Professor Paterson's comments in his investigation that there is a public interest in transparency so that the public are able to know the rules that are being applied when assessing these types of applications.<sup>5</sup> The Ombudsman considered it would be desirable for future applicants to know what standard is going to be applied when their applications are assessed so that they may make a fully informed decision on whether to lodge an application in the first place, particularly when it can be a costly and involved exercise.
58. There is also a general expectation that certain kinds of information about state sector decision making should be made publicly available. This principle is reflected in section 22 of the OIA, which provides persons with a right to access internal policies, principles, rules or guidelines in accordance with which decisions or recommendations are made in respect of that person in their personal capacity. Notably, the right of access to internal rules under section 22 is not subject to section 9(2)(h) or 9(2)(g)(i) of the OIA.
59. The Ombudsman therefore considered that the countervailing public interest in this case required the disclosure of the information at issue, to allow the public to properly assess the officials' recommendations and the Ministers' exercise of their decision making powers, thereby promoting transparency and accountability in the process. The release of the information would also promote more effective public participation, recognised in section 4(a)(i) of the OIA, in the forthcoming decisions to be made about overseas investment in land, as the public will be able to be more fully informed about previous decisions made under the current Overseas Investment Act and the effectiveness of the current provisions.
60. Consequently, the Ombudsman formed the provisional opinion that, in the circumstances of this case, the countervailing public interest in disclosure of the legal advice outweighed the need to withhold the information under section 9(2)(h), or would outweigh 9(2)(g)(i) if it were to apply to the information.

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<sup>5</sup> at page 9

## Outcome

61. Following consideration of the Ombudsman's provisional opinion, LINZ agreed that in the circumstances of this case the information should be released.
62. In relation to the legal advice, LINZ sought, and the Attorney-General agreed, to waive the Crown's legal professional privilege in respect of this information.
63. The information at issue was subsequently disclosed to NBR, and the Ombudsman discontinued his investigation on the basis that the complaint was resolved.
64. The Ombudsman decided to publish this case note in the public interest under clause 2(1)(b) of the Ombudsmen Rules 1989.