



Request for information about an agency's lease costs

Legislation	Official Information Act 1982, ss, 9(1), 9(2)(b)(ii)
Agency	Ministry of Social Development
Request for Ombudsman	Lease costs at Bowen Campus and The Terrace
Case numbers	435959, 452780, 452395
Date	September 2017

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Summary

Three requests were made to the Ministry of Social Development for information about the costs of leases held at its former (Bowen Street), and current (The Terrace) premises. The Ministry refused those requests under section 9(2)(b)(ii) of the Official Information Act 1982 (OIA) in order to protect the commercial position of third parties from unreasonable prejudice.

Based on the information before me, on 15 September 2017 I formed the opinion that section 9(2)(b)(ii) did not provide good reason to withhold the information, and the requests should not have been refused. I recommended that the Ministry release the information, and on 17 September 2017, the Ministry provided the information to the complainants.

Background

First request and complaint

1. On 21 September 2016, the Ministry received a request for a copy of the 1 October 2013 report titled *'Head Office Accommodation Final Commercial Terms – Ministry of Social Development'*.
2. On 3 October 2016, the Ministry advised the requester that the report was publically available, and provided the website address at which the report could be accessed.
3. However, the report contained a number of redactions, and on 7 October 2016 the requester made a complaint to this Office regarding the redaction of information about the rent paid at the Ministry's premises (at both the Bowen Campus and The Terrace).

Second request and complaint

4. On 13 April 2017, the Ministry received the following request, transferred pursuant to section 14 of the OIA by the Ministry of Business, Innovation and Employment:
A breakdown of the total rent costs for each building MSD occupied behind Parliament before the move to The Terrace for the 2015 financial year.
5. The Ministry responded on 19 April 2017, refusing the request pursuant to sections 9(2)(b)(ii) and 9(2)(j) of the OIA. A complaint was made to this Office about that decision on 27 April 2017.

Third request and complaint

6. On 1 February 2017, the Ministry received a further request for (amongst other information):
 - the lease costs of the Ministry's National Office buildings at 56 The Terrace; and
 - the lease costs for the Ministry's additional accommodation, for staff who were unable to be accommodated at 56 The Terrace.
7. On 24 March 2017, the Ministry refused this request, citing section 9(2)(ba)(ii) of the OIA. It subsequently confirmed that this was a typing error, and the provision on which it relied to withhold the information was section 9(2)(b)(ii).

8. The requester made a complaint to this Office about that decision on 3 May 2017. They noted that the lease agreement for 56 The Terrace was an 18 year agreement, and questioned how the disclosure of the lease costs could prejudice the commercial position of any party.

Comments received during investigation

9. I notified the Ministry of my intention to investigate each complaint, and requested from it an explanation of the grounds it relied on under the OIA to refuse the requests, and any further comments on the harm or prejudice that it considered would arise from disclosure of the information. The Ministry advised:

The negotiation of 56-66 The Terrace was led on behalf by PMCoE, legal advisors, architects and engineers in order to achieve the most favourable terms and conditions for the Crown and maximise value for money. The Crown's legal services provider during negotiations... certified the development agreement.[sic]

10. In reaching agreement, criteria such as the following were considered:
- whether additional funding would be required for property costs over the 20 year period;
 - projected property cost avoidance;
 - efficient space footprint;
 - building safety and business continuity capability;
 - a single move to minimise disruption;
 - cost-benefit analysis; and
 - timeliness.
11. The Ministry advised that it considered rental costs to be a *'prime indicator of overall pricing strategy and will relate not only to a base figure, but the configuration of any lease incentives, rent review periods, building performance specifications and on-going occupancy and fluctuating space needs'*. The disclosure of this information could reveal a *'key tenant'* of any bid, and allow commercial competitors an advantage in future negotiations.
12. In respect of the second request, which sought the rental for each building on the Bowen Campus, the Ministry submitted that disclosure of this information would adversely affect the owner of the properties. It considered that disclosure of the precise amount of rent paid would impact on the property owner's ability to negotiate rent for that property and for their other properties. The Ministry further submitted that any public

interest in favour of disclosing this information was met through the publication of the average square metre price for the Ministry's National Office through Select Committee.

13. Similarly, in responding to the complaint about request three, the Ministry suggested that disclosure of the rent costs at The Terrace properties would prejudice the commercial position of the property owners:

The prejudice to the commercial position would be the impact on the owner of this information being known to other property owners and to potential tenants in the commercial rental market in central Wellington. Other property owners could utilise this information to entice tenants from one building to another.

The expected market dynamic is for property owners to keep private the rental agreed in transactions. Releasing the precise amount paid for any given location could be perceived as restricting the property owner's ability to negotiate rent for the property or for their other properties.

Response to the provisional opinion

14. Consistent with the reasoning set out below, on 11 July 2017, I wrote to the Ministry setting out my provisional opinion that there were not good grounds under the OIA to withhold the information requested. I invited the Ministry to comment, before I formed my final opinion.
15. The Ministry remained of the view that section 9(2)(b)(ii) of the OIA applied to the information requested, as well as section 9(2)(j) in respect of the information covered by request one. It advised that it had consulted with the landlords of the relevant properties, and some concern had been expressed about the release of the information and/or the nature of the information to be released.
16. The Ministry also advised that it considered it had met the public interest in disclosure of the information requested, through the proactive release of information about the Ministry's move from Bowen Street to 56 The Terrace.
17. Finally, the Ministry noted that it was concerned about the collective impact of an Ombudsman forming an opinion that information of this type ought to be disclosed. Within the Wellington office market, government agencies account for a significant amount of available office space. The disclosure of lease costs may change the dynamics of this market, and hinder on-going or future negotiations. Further, it could impair the ability of agencies to achieve best value, and create an unfair advantage for the landlords of office space.

Analysis and findings

18. The information sought in the above requests comprises of:

- a. rent paid by the Ministry at the Bowen Campus, including a breakdown of the rent paid for each building; and
- b. rent paid by the Ministry at 50, 56 and 89 The Terrace.

Although the first request related to a copy of the October 2013 report, the complaint was about the decision to withhold the rent paid at The Terrace. The above information appears to cover this.

Section 9(2)(b)(ii)

19. Subject to section 9(1), section 9(2)(b)(ii) of the OIA provides good reason for withholding official information if, and only if, it is necessary to protect information, where making that information available would be likely to unreasonably prejudice the commercial position of the person who supplied or who is the subject of the information.
20. I accept that the building owners have a 'commercial position' as they are in the business of leasing commercial properties. However, it is not clear to me that unreasonable prejudice would result to that position were the requested information to be made available.
21. The Ministry has submitted that the disclosure of the information would reveal the owner's pricing strategy. However, even if other lessees or lessors were to use this information in the context of their own negotiations for the lease of property, it is a significant leap to suggest that this knowledge would be likely to unreasonably prejudice the commercial position of those who own *these* buildings.
22. The Ombudsmen have rarely been persuaded that disclosure of a total cost for services/goods provided to a public body would prejudice anyone's interests. Certainly, there is no suggestion that previous disclosures of this nature have deterred private sector entities from conducting business with the public sector, nor resulted in a prejudice to the commercial position of a private sector entity.
23. An internet search shows that similar information is available in respect of other agencies. For example, Statistics New Zealand has disclosed that it is currently paying an average of \$793.95 per square metre, for a two year lease of four floors in Westpac House on Lambton Quay.¹ Other agencies, including local authorities, have previously disclosed this information to requesters in the course of resolving complaints made to the Ombudsman. Average rates within a market are well known.
24. The October 2013 report identifies that the Bowen Campus had to be vacated in order for the landlord to carry out a full redevelopment of the site. The low quality of the building correlated to the low rent that was paid at that time. The report acknowledged that this low level of rent would not be achievable for a fit-for-purpose accommodation solution in the Wellington region. That disclosure of the rent paid for these premises

¹ Individual rates were disclosed for each of the floors.

prior to redevelopment could unreasonably prejudice the commercial position of the owner in future transactions seems highly unlikely.

25. One complainant commented on the length of the lease obtained by the Ministry at the accommodation on The Terrace. The Ministry did not address this in its responses. It seems unlikely that the rent to be paid for a long-term tenancy, with negotiated incentives and various expenditures, could impact on a possible negotiation for that premises when the lease concludes.
26. There are a number of factors that contribute to the negotiation of leases. The Ministry acknowledges this in its description of relevant factors, above. This includes, but is not limited to:
 - the location, size, and condition of the premises;
 - amenities and operational expenses;
 - the term of the lease and 'security' of the lessee;
 - the suitability of the premises for the intended use, and any expenditure required to alter this;
 - incentives that may be negotiated;
 - market factors (such as availability).
27. In light of the multiple relevant factors leading to a negotiated rent, I do not agree that disclosure of the rental costs would reveal pricing strategy. The Ministry's suggestion that disclosure of the rates paid for individual tenancies held by a particular lessee, at a particular time, and for particular properties would prejudice the ability of the property owner to negotiate on other, different properties, is unconvincing.

Section 9(2)(j)

28. The Ministry's concerns about the effect of disclosing this type of information on the ability of government agencies to negotiate the best lease terms possible. I understand that the Ministry is concerned that if prospective lessors can routinely expect the release of tenancy costs upon request, those requests will be made in order to determine the amounts paid by other agencies, and to set their prices accordingly.
29. Subject to section 9(1), section 9(2)(j) of the OIA provides good grounds for the withholding of information if, and only if, disclosure would be likely to prejudice negotiations in which an agency is either engaged or reasonably contemplates. It is not sufficient that the information could be relevant to negotiations at some undefined point in the future.
30. As the Ministry is largely concerned about a precedent effect, there do not appear to be any current or reasonably contemplated negotiations that it considers would likely be prejudiced by the disclosure of this information. In the response to second complaint, the

Ministry referred only to a possible prejudice to negotiations by the property owner, rather than to the Ministry itself. These factors alone mean that section 9(2)(j) does not apply.

31. Nevertheless, landlords will already have some idea of the market value of office space, as this is how the market operates. Agents and owners of multiple spaces will likely be well aware of the amounts paid by various agencies. It is not uncommon to receive the details of the asking rate for accommodation space when making inquiries about particular leases. Further, as noted above, there are multiple factors that are relevant to the negotiation of rent costs, which cannot be gleaned from the final \$/m² rate. Government agencies, as a large component of the Wellington office market, would appear to hold a position within the market that would not necessarily be impaired by the disclosure of *this* information. Information of this nature has been publicly disclosed by other agencies at times. The Ministry of Business, Innovation, and Employment has provided the second complainant with the projected gross rental and rebate rate for both the Bowen State Building and the Charles Fergusson tower (leases to commence 1 February 2019).²
32. In this case, I consider that the circumstances are such that disclosure would not be likely to prejudice negotiations (if in fact negotiations are reasonably contemplated). Again, I note that the previous amounts paid for the Bowen Campus would appear to be of little relevance for a property that no longer met the accommodation needs of the Ministry, and which was to be renovated upon the Ministry vacating.
33. However, this does not mean that in all circumstances where a request is received for the rent/lease costs paid by a government agency or department, the information must necessarily be disclosed. Each request must be considered on its own merits, and my opinion in this instance applies only to the requests at hand. There may very well be circumstances surrounding a request that mean disclosure of the information would be likely to prejudice a protected interest under the OIA,³ or that disclosure of total amounts, rather than a breakdown, is appropriate.

Section 9(1) – public interest

34. As I do not consider that a section 9(2) withholding ground applies, it is not necessary for me to consider section 9(1) of the OIA. However there is, in my opinion, a strong public interest in the availability of this information.
35. That public interest relates to the Ministry's accountability in respect of public expenditure, particularly where it is a long-term and ongoing cost incurred by the taxpayer. Although section 9(2)(j) represents a public interest in ensuring that agencies

² In this case the gross rent per m².

³ For example, where it appears that the request may be for the purpose of improper gain or advantage, or where there are current negotiations (or reasonably contemplated negotiations) that would likely be prejudiced by the release of the particular rent costs requested.

are able to negotiate effectively for the expenditure of public money, this must be balanced against the very strong interest in transparency of information that will establish that negotiations were conducted appropriately, and accountability for large and long-term expenditure such as in this case.

36. Although the Ministry has disclosed some information about the relocation to The Terrace, in these particular circumstances (being considerable expenditure for a 20-year term lease), I would have likely considered the public interest factors favouring disclosure to outweigh the interests protected by section 9(2)(j) or 9(2)(b)(ii), had those grounds applied.

Ombudsman's final opinion and recommendation

37. For the reasons set out above, I have formed the provisional opinion that the Ministry should not have refused the requests.
38. I recommend that the following information be released:
- a. to the first complainant: the rent paid by the Ministry at 56-66 The Terrace;
 - b. to the second complainant: the rent the Ministry was previously paying for each building at the Bowen Street campus;
 - c. to the third complainant: the rent paid by the Ministry at 50, 56 and 89 The Terrace.
39. The Ministry may choose to provide additional or explanatory information when disclosing this information.
40. 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 that recommendation. This public duty applies unless, before that day, the Governor-General, by Order in Council, otherwise directs.

Leo Donnelly
Ombudsman