



## Request for Hon John Banks' statement to the Police

### Ombudsman's opinion

<b>Legislation:</b>	Official Information Act 1982, ss 6(c), 9(2)(a), 9(2)(ba)(ii) (see Appendix for full text)
<b>Requester:</b>	The New Zealand Herald and Office of the Labour Leader
<b>Agency:</b>	New Zealand Police
<b>Ombudsman:</b>	Professor Ron Paterson
<b>Reference numbers:</b>	342959/341270
<b>Date:</b>	December 2013

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## Summary

David Fisher of The New Zealand Herald and Kate Challis of the Office of the Labour Leader requested a copy of the statement provided by the Hon John Banks to the Police in the course of their investigation into alleged irregularities in respect of electoral funding donations. The allegations pertained to the 2010 Auckland Super City Mayoral election in which Mr Banks was a candidate for the mayoralty. The statement was withheld pursuant to sections 9(2)(a) and 9(2)(ba) of the Official Information Act 1982 (OIA). I have formed the opinion that in September and October 2012 the Police had good reason to refuse parts of the statement under those provisions but that the decision to withhold the statement in full was not justified.

## My role

1. As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which a Minister or agency subject to the OIA refuses to make official information available when requested. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused.

## Background

2. On 26 July 2012, Mr Fisher requested:

*“all information gathered by Police in its investigation into the electoral returns of Hon John Banks, with the intent it would include the police file holding job sheets, statements and other investigative resource.”*

3. On 11 September 2012, the Police responded to the request. The Police commented:

*“Police considers there is a very high privacy interest in information relating to investigations which did not result in charges being laid, because the allegations remain unproven. However, Police accepts that there is also a very high public interest in confirming that a thorough investigation was completed and that appropriate decisions were made in relation to a complaint about a public and democratic process.*

*Following consultation with the Ombudsman, Police considers that this public interest will be met by disclosure of the executive summary of Detective Inspector Mark Benefield’s criminal assessment report. I also enclose the statements of those witnesses who have authorised disclosure.”*

The remainder of the information was withheld pursuant to sections 9(2)(a), 9(2)(ba), 9(2)(h) and 6(c) of the OIA.

4. On 24 September 2012, the Ombudsman received a complaint from Mr Fisher about the decision to withhold the statement provided by Mr Banks to the Police. In commenting on the refusal, Mr Fisher stated:

*“The issue is one of huge public importance. It involves a sitting MP and his conduct during a prior electoral campaign. It relates to statements he has made publicly, and his unwillingness to have statements made under oath on the same subject disclosed. Further, it relates to his public statements about a willingness to be open – and then his private refusal to do so.”*

5. Ms Challis emailed the Police on 14 September 2012 requesting a copy of Mr Banks’ statement.
6. On 9 October 2012, the Police refused the request under sections 9(2)(a) and 9(2)(ba) of the OIA.
7. On 15 October 2012, the Ombudsman received a complaint from Ms Challis about the refusal. Ms Challis commented on the refusal as follows:

*“The response I received from Police noted that they were withholding in full [his] statement based, in part, on section 9(2)(ba), that releasing the information would be likely to prejudice the supply of similar information, or information from the same source, in the future. I note that included as part of the [information released] is a letter from Hon Banks’ lawyer opposing the public release of his witness statement, however no privacy reason was cited for withholding the information. Rather, his rationale for opposing release was on the basis that it was his view that the disclosure would likely bring about ‘irresponsible commentary’, rather than the fact that it would prejudice supply of similar information, or from the same source, in the future.*

*Under section 9(1) information must be released where all other considerations are outweighed by the public interest. In this case, Police found that the release of all other statements was in the public interest. Therefore there appears to be no basis for withholding one statement when all other statements were considered to pass the ‘public interest’ test.”*

## Investigation

8. On 5 November 2012, the Deputy Ombudsman notified the Police of the complaints. The Deputy Ombudsman sought a copy of the information at issue, together with any other papers relevant to the Police decision to withhold the statement.
9. The Police provided a response on 5 November 2012.
10. On 9 November 2012, my predecessor, former Ombudsman David McGee, sought Mr Banks’ comments on the requests. On 14 November 2012, Mr Banks confirmed that he opposed the release of his statement.

11. On 22 January 2013, the Deputy Ombudsman commenced the process of consultation with the Privacy Commissioner concerning the privacy issues raised by this request. On 24 April 2013 comments on the complaints were received from Mike Flahive, Assistant Commissioner (Investigations), Office of the Privacy Commissioner.
12. On 3 May 2013, the former Ombudsman met with the Assistant Commissioner (Investigations). Further material was sought from the Police, namely a copy of the information that had been publicly released from the file and a copy of the complete investigation report.
13. The Police provided a response on 3 May 2013. Further information regarding the Police decision-making on the request was provided on 21 May 2013.
14. Further comments were received on behalf of the Privacy Commissioner on 24 May 2013.
15. On 11 July 2013, I wrote to the requesters outlining my provisional opinion.
16. On 18 and 30 July 2013, comments on my provisional opinion were received from the requesters.
17. On 17 October 2013, I wrote to the Police and the Hon John Banks MP outlining my provisional opinion.
18. I received comments from the Police on 6 November 2013. Mr Banks did not comment on my provisional opinion.

## Comments received during investigation

### The Police

19. The Police have confirmed that all of those interviewed during the investigation were approached and canvassed on their views on release of their statement. A number indicated they would like their statements released. Statements released with redactions were from people who agreed to the release of the information with those redactions. A number, including Mr Banks, did not consent to disclosure and their statements were not released.

### The New Zealand Herald and Office of the Labour Leader

20. Mr Fisher considered that the following facts *“balanced against sections 9(2)(a) and 9(2)(ba)(i) weigh in favour of disclosure”*:
  - a. *“Mr Banks was interviewed as the person with primary responsibility for the electoral return at the focus of the police inquiry. ... The characterisation of the role Mr Banks had in the investigation is important when considering the role he assumes and the protections he should enjoy. ... Mr Banks would be*

*better characterised as the suspect. In taking on the role of suspect, he has waived his right to silence and chosen to be interviewed by police.”*

- b. *“In the case of Mr Banks, the case was proved in relation to [section] 134(2). ... A significant factor in Mr Banks escaping prosecution was the time it took to discover the offending. The time period presumably ran contrary to the will of Parliament ... . The current law, passed on June 28 2013, gives prosecutors three years in which charges can be brought.”*
- c. *“The most critical factor here, which elevates the entire matter, is the positions held by Mr Banks at the time the false electoral return was submitted and at the time the statement was given to Police. Mr Banks was Auckland City mayor at the time of the false electoral return. He was a Member of Parliament at the time of the statement. Throughout this time also, Mr Banks has been a Justice of the Peace. ... Mr Banks has, at one stage or another, sworn to uphold extremely high standards. ... I submit the public would consider there would be the highest of obligations for someone in each of those separate roles to cooperate with police – an obligation beyond that which the ordinary citizen might feel. ... As such, I would suggest the Assistant Commissioner’s claim the release of the statement would have a ‘chilling effect’ to be an extremely inaccurate assessment of public expectations.”*
- d. *“The public interest in this case cannot possibly have been met until the public are in a position to consider what he had to say when submitting to a police interview. Mr Banks has repeatedly said he has ‘nothing to fear and nothing to hide’. One of the clearest examples of this was when he promised ‘everything will come out in the wash’ while invoking his office as Justice of the Peace. ... Everything has not come ‘out in the wash’. The three-hour police interview is the only time Mr Banks has given a detailed recounting of the events which led to the false return being filed.”*
21. Ms Challis also made submissions along similar lines to those raised in b) and d) above. Ms Challis did not agree that disclosure would have a “chilling effect” on people dealing with the Police given that some witness statements had been released.

## Analysis and findings

### Local Electoral Act 2001

22. The requesters were both of the view that the offence in section 134(2) of the Local Electoral Act 2001 was proved to have been committed. However, that is not the case. While the Police concluded that the elements of section 134(2) were met, the offence was one of strict, not absolute, liability.

23. The now repealed section 134(2) stated:

*“Every candidate commits an offence and is liable on summary conviction to a fine not exceeding \$5,000 who transmits a return of electoral expenses that is false in any material particular unless the candidate proves—*

- (a) that he or she had no intention to mis-state or conceal the facts; and*
- (b) that he or she took all reasonable steps to ensure that the information was accurate.”*

Accordingly, the charge could be defended by proving that there had been no intention to mis-state or conceal the facts, and that all reasonable steps to ensure that the information was accurate had been taken.

## **Section 9(2)(a)**

24. Section 9(2)(a) applies if the withholding of the information is necessary to protect the privacy of natural persons.

25. As required by the OIA, the Privacy Commissioner was consulted on the merits of refusing the request on this ground. On behalf of the Privacy Commissioner, the Assistant Commissioner (Investigations) advised that he and the Privacy Commissioner consider the withholding of this statement is necessary to protect the privacy of Mr Banks and other persons in circumstances where the Police have conducted an investigation and the allegations remain unproven. The Assistant Commissioner (Investigations) commented:

*“A feature of the context here is that Mr Banks was running for public office as mayor of Auckland and subject to statutory responsibilities. He is now currently an MP within the Act party. Despite those contextual matters Mr Banks is entitled to privacy.”*

26. I accept that at the time of his interview by the Police, Mr Banks would have had a reasonable expectation of privacy in his statement. He would also have expected privacy to be maintained when the Police decided not to charge him.

27. However, holders of public offices and persons standing for public office submit themselves to the judgement of their fellow citizens and, to some extent, can be taken to surrender some of the privacy interest they would otherwise reasonably expect, depending on the status of the office they aspire to. That is in the nature of public office and election to public office. The law has recognised this with the development of a ‘public interest’ test as a defence to defamation of persons holding elected office.

28. I am not convinced that a Member of Parliament who is interviewed by the Police, with a Queen’s Counsel present, about alleged irregularities in respect of electoral funding donations when campaigning for Mayor of New Zealand’s largest city, can have a high expectation of privacy in their statement, irrespective of whether charges ensue.

29. Nonetheless, I accept that section 9(2)(a) applies in this case, in the sense that Mr Banks had some expectation of privacy in his statement to the Police.

### Section 9(2)(ba)

30. Section 9(2)(ba) applies if the withholding of the information 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; or would be likely otherwise to damage the public interest*”.
31. The Ombudsmen have strongly supported the need to maintain the confidential nature of statements made to the Police. In their Annual Report 2009/2010, the Ombudsmen commented on their general approach to the withholding of such statements:<sup>1</sup>

*“There is a high degree of confidentiality attaching to information provided by a person interviewed by the Police. As one Judge has said:*

*‘Members of the public who volunteer information to the police are entitled to expect that it will be used only for the purposes of the investigation and subsequent criminal proceedings. Their expectations should be respected’ (Taylor v Serious Fraud Office [1997] 4 All ER 887 at 904, per Millett LJ).*

*The confidentiality of witness statements outside Police investigations and criminal proceedings is not absolute, but breaching confidence without good reason is likely to damage the public interest. It would inhibit potential witnesses from cooperating with the Police, and contribute to the erosion of trust one can expect to obtain between the Police and the citizenry.*

*Considerations involved in requests for witness statements will depend on the stage investigations have reached: while investigations are proceeding, while court proceedings are underway, and after court proceedings are concluded or investigations have otherwise ceased.”*

In relation to the situation where court proceedings have concluded or no court proceedings ensue, the Ombudsmen noted:

*“After court proceedings have concluded and in cases where police investigations do not lead to charges being preferred, the Criminal Disclosure Act no longer applies. Section 6(c) will continue to apply in particular cases where it can be shown that release of a statement or part of a statement would reveal a particular matter that would be likely to prejudice the maintenance of the law, such as information identifying an informant or police investigative techniques or practices. But we do not consider that*

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<sup>1</sup> 2009/2010 Report of the Ombudsmen for the year ended 30 June 2010, page 31.

*section 6(c) will continue to apply as a general ground to deny access to such statements.*

*However, notwithstanding this, the Police's general obligation of confidence in respect of witness statements continues. The Police are not only entitled, in our view they are obliged, to consider requests for third party access to witness statements against that background. Thus the application of section 9(2)(ba) (information held subject to an obligation of confidence) and section 9(2)(a) (protection of privacy) will be particularly relevant in assessing such requests.*

*But unlike section 6(c) these are not conclusive grounds for withholding information, and whether it is possible to rely on them will depend upon an assessment of the overall public interest applying in the particular circumstances."*

32. The fact that Mr Banks was a 'suspect' and agreed to be interviewed by the Police does not erode the confidentiality of the communication. The same interest applies, whether the person who volunteers information is a witness or a suspect. There is a clear expectation that the information the Police collect will be used only for the purpose for which is collected, namely the investigation and subsequent criminal proceedings. This principle has its counterpart in Privacy Principle 10 whereby personal information collected for one purpose should not be used for another purpose.
33. As noted by Elias CJ in *Television New Zealand Ltd v Rogers*:<sup>2</sup>

*"Information gathered as part of their duties is not information police officers are entitled to deal with as they see fit. They cannot provide it or withhold it from private interests at whim. There must be some criminal justice or operational reason for its use."*

This obligation is reflected in the Police Code of Conduct.

34. There is a state interest in maintaining the confidentiality of witness statements, even after investigations have ceased, to ensure that other persons in similar situations are not inhibited from co-operating with Police enquiries. Ms Challis argued that there is unlikely to be a "chilling effect" on future police cooperation in a situation such as this where some of the statements have been released. However, the public appreciate the distinction between the release of a statement in circumstances where consent has been obtained, and where it has not. This is reflected in the law (Privacy Principle 11(d) of the Privacy Act), which allows for the disclosure of personal information where the disclosure is authorised by the individual concerned. An erosion of trust between the Police and the public may ensue where the person providing the statement to the Police does not consent, but the Police release the statement regardless.

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<sup>2</sup> [2008] 2 NZLR 277 (SC) at para [17].

35. Mr Fisher argued that the disclosure of Mr Banks' statement, notwithstanding his lack of consent, would not damage the public interest because Mr Banks is a public figure and *"it is impossible the public would consider Mr Banks' situation in the same light they would consider their own situations when considering if they should make statements to the police"*.

Mr Fisher also pointed to Mr Banks' claim (in an interview with journalist Paul Holmes on TVNZ's Q & A programme on 29 April 2012):

*"I can tell you that when I signed my declaration for the mayoralty I signed it in good faith in the knowledge as a Justice of the Peace as true and correct.*

*I have nothing to fear and nothing to hide and I welcome the inquiry and everything will come out in the wash, Mr Holmes."*

Mr Fisher submits that *"everything has not 'come out in the wash'"* as Mr Banks has refused to authorise release of the transcript of his three-hour police interview, *"the only time Mr Banks has given a detailed recounting of the events which led to the false return being filed"*.

36. Gauging the consequences of release in a case such as this is not an exact science. The test in section 9(2)(ba)(ii) is whether disclosure *"would be likely"* to damage the public interest. The phrase *"would be likely"* has been interpreted by the Court of Appeal to mean *"a serious or real and substantial risk to a protected interest, a risk that might well eventuate"*.<sup>3</sup>
37. In my view the risk to the protected interest in this case is a critical consideration. *"The public"* includes public figures and it is important that they, like other members of society, can make statements in the course of confidential Police enquiries free from the worry that, in the event that no charges are laid against them, their statements may still be publicly disclosed. There is certainly a risk that disclosure in the circumstances of this case would be likely to undermine the trust underlying the relationship between the Police and the public, which is necessary to support the Police in carrying out their role.
38. Again, comments made by Elias CJ in the *Rogers* case are pertinent:<sup>4</sup>
- "In addition, consequential damage may include not only ... but also ... public interests such as the encouragement of cooperation with the police. ... William Young P in the Court of Appeal was prepared to accept there could be a deterrent effect ... . There is an affidavit before the Court by experienced defence counsel that she would not advise participation in such video interviews if the material could end up being broadcast on the decision of the police officer in charge. ... The public interest in the wider aspects of the administration of justice prompts care."*

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<sup>3</sup> Commissioner of Police v Ombudsman [1988] 1 NZLR 385, 391.

<sup>4</sup> At para [30].

39. I accept that section 9(2)(ba)(ii) applies in the circumstances of this case.

## Public interest

40. Having accepted that sections 9(2)(a) and 9(2)(ba)(ii) apply, I must consider whether *“the withholding of the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available”* (section 9(1) refers).

41. The issue under section 9(1) is not simply whether there is *“a public interest”* in making the information available, but rather whether the considerations favouring disclosure outweigh the interest that would be protected by withholding the information requested.

42. The accountability of the Police for the way they have carried out their duties is always an important factor in cases such as this. Following consideration of the circumstances of this case and consultation with the Privacy Commissioner, I am satisfied that the public interest in accountability has been largely met by publication of the information the Police have already released from the investigation file. This information can be found at [http://fyi.org.nz/request/police\\_file\\_on\\_john\\_banks\\_invest#incoming-3192](http://fyi.org.nz/request/police_file_on_john_banks_invest#incoming-3192).

43. Another consideration favouring disclosure in the public interest is that the information relates to the integrity of the 2010 mayoral election and elections sit at the heart of democracy. Furthermore, Mr Banks made public statements such as:<sup>5</sup>

*“As I have said previously, my electoral return was filed in accordance with the law as set out by the Local Electoral Act 2001. I am 100% confident that the investigation will conclude in my favour.”*

44. The Police concluded that the elements of section 134(2) of the Local Electoral Act 2001 were met but that they were prevented from laying a charge because of section 14 of the Summary Proceedings Act 1957, which set a time bar for bringing proceedings of six months from the time when the matter arose.

45. The Police appreciated that these considerations raised the public interest in the disclosure of information regarding this investigation and as a result released a redacted copy of the executive summary of the criminal assessment report; the statements of those witnesses who authorised disclosure; the complaint letters; and the letters to the complainants which outline the Police findings. However, I am not satisfied that this material fully satisfies the public interest in disclosure.

46. Given the subject matter of this Police investigation, Mr Banks is in a different position from the average citizen who provides a statement to the Police. When the Local Electoral Amendment Bill (No 2) passed its third reading in Parliament earlier this year, Local Government Minister, the Hon Chris Tremain, stated:<sup>6</sup>

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<sup>5</sup> Statement by John Banks re 2010 Auckland Mayoralty Campaign Return, April 30 2012, [www.act.org.nz](http://www.act.org.nz).

<sup>6</sup> Parliamentary Debates (Hansard) for Thursday, 13 June 2013.

*“The public rightfully expects high levels of transparency and confidence in the conduct of all public elections.”*

The public interest in the transparency and accountability of local government candidate donations requires that the public have access to those parts of Mr Banks’ statement which relate to his solicitation of campaign donations and contact with potential donors. Given the public disquiet about the integrity of the fundraising for the 2010 Auckland Mayoral election, without direct access to Mr Banks’ statement, the public will not be adequately informed.

47. In my view, in relation to the majority of Mr Banks’ statement, the public interest considerations discussed above outweigh the privacy and confidentiality interests protected by section 9(2)(a) and section 9(2)(ba)(ii). The parts that are personal in nature or relate to other persons’ privacy should continue to be withheld.
48. The Privacy Commissioner does not agree that the considerations favouring the release of the information in the public interest outweigh the interests in withholding. However, while there is a statutory requirement under the OIA for an Ombudsman to consult with the Privacy Commissioner when considering whether section 9(2)(a) applies in a particular case, it is ultimately for the Ombudsman to form an independent opinion as to whether the public interest requires disclosure or not.

## Ombudsman’s opinion and recommendation

49. For the reasons set out above, I have formed the opinion that in September and October 2012 the Police had good reason to withhold parts of Mr Banks’ statement under sections 9(2)(a) and 9(2)(ba)(ii) of the OIA, but the decision to withhold the statement in full was not justified.
50. I recommend that the Police release a redacted statement to the requesters once the related court proceedings against Mr Banks have concluded. I have stipulated that the release be delayed because although I consider the OIA did not provide good reason to withhold the majority of the statement at the time the Police made its decision on the requests, in light of subsequent events, disclosure at the present time would be likely to prejudice Mr Banks’ right to a fair trial (section 6(c) of the OIA). Accordingly, a recommendation to disclose before the conclusion of the pending court proceedings would be contrary to one of the purposes of the OIA which is *“to protect official information to the extent consistent with the public interest ...”* (section 4(c) of the OIA).

## Appendix 1. Relevant statutory provisions

### Official Information Act 1982

#### 6. Conclusive reasons for withholding official information

Good reason for withholding official information exists, for the purpose of section 5, if the making available of that information would be likely—

...

- (c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial;

#### 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;
  - ...
  - (ba) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—
    - (i) 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; or
    - (ii) would be likely otherwise to damage the public interest;