



## Request for legal advice concerning outsourcing contact with taxpayers

<b>Legislation:</b>	Official Information Act 1982, ss 18(c)(i), 52(3)(b)(i) and 9(2)(h); Tax Administration Act 1994, s 81 (see appendix for full text)
<b>Agency:</b>	Inland Revenue Department
<b>Ombudsman:</b>	Professor Ron Paterson
<b>Reference number(s):</b>	339486
<b>Date:</b>	July 2014

### Contents

<b>Summary</b>	<b>2</b>
<b>My role</b>	<b>2</b>
<b>Background</b>	<b>2</b>
The request	2
The complaint	3
<b>Investigation</b>	<b>3</b>
<b>Analysis and findings</b>	<b>4</b>
Information at issue	4
Section 81(1) Tax Administration Act 1994	4
Section 18(c)(i) Official Information Act 1982	4
Section 52(3)(b)(i) Official Information Act 1982	5
Section 9(2)(h) Official Information Act 1982	8
<b>Ombudsman's opinion</b>	<b>10</b>
<b>Appendix 1. Relevant statutory provisions</b>	<b>11</b>

## Summary

The complainant asked the Inland Revenue Department (IRD) to provide him with copies of its legal advice relating to outsourcing contact with taxpayers about overdue tax debt, overdue tax returns and other matters. IRD withheld the information for the following reasons:

- IRD was obliged to withhold the information under section 81(1) of the Tax Administration Act 1994 (TAA). Accordingly, under section 18(c)(i) of the Official Information Act 1982 (OIA), IRD was entitled to refuse the complainant's request as releasing it would be contrary to section 81(1) of the TAA; and
- it was entitled to withhold the information under section 9(2)(h) of the OIA in order to maintain legal professional privilege.

Based on the information provided to me, I have concluded that IRD was entitled to withhold the information at issue under sections 18(c)(i) and 9(2)(h) of the OIA.

## My role

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

## Background

### The request

2. In an email of 19 July 2012 to IRD, the complainant requested on the following information from IRD:

*“copies of all legal advice provided by officers of the Inland Revenue Department, Crown Law or any other Crown or non-governmental body to the Commissioner of Inland Revenue, or any officer of the Inland Revenue Department, in relation to the Inland Revenue initiatives: Returns Study Exploring innovative solutions to enhance return filing and Debt Study: Exploring innovative solutions to enhance debt collection.”*

3. In a letter of 15 August 2012 to the complainant, IRD stated:

*“Two documents have been identified as falling within [your] request. Those documents contain legal advice, and are covered by section 81 of the Tax Administration Act. I am not satisfied that disclosing privileged material to you could be said to be ‘carrying into effect’ the Revenue Acts or that any other exception to s.81 applies. Accordingly I am declining your request on the*

*basis of s.18(c)(i) of the Official Information Act. My decision is consistent with s.9(2)(h) of the Official Information Act which allows withholding information where necessary to maintain legal professional privilege. I have also considered whether there is any public interest in the disclosure of the advice to you which would outweigh the need to withhold it, but have concluded that there is not."*

4. During the course of this investigation, IRD identified a further document within the request: an opinion of 5 July 2010 from an external legal adviser retained by Burleigh Evatt Consulting Ltd, providing advice to IRD on options to improve the collection of overseas student loan debt. The advice concerns the legal implications of those options and forms part of Burleigh Evatt's advice to IRD. As with the other two opinions, this opinion does not concern specific taxpayers' tax affairs.

## The complaint

5. On 29 August 2012, the Ombudsman received a complaint about IRD's withholding of the information at issue.
6. In his email of 29 August 2012, the complainant stated:

" ...

3. *We dispute that the provisions of section 81 of the TAA apply and furthermore we also dispute that the matter is subject to legal professional privilege.*
4. *The Inland Revenue initiatives involve the IRD engaging the services of call centres to contact taxpayers about overdue tax debt and overdue tax returns. This is an unprecedented move by the IRD to outsource some of its core functions relating to the assessment and collection of tax. We therefore believe that contrary to [IRD's] assertion it is in the public interest for the legal opinions forming the basis for these initiatives to be released. We request the Ombudsman investigates and confirm[s] that such information should be in the public domain."*

## Investigation

7. On 22 April 2013, the Ombudsman notified IRD of his intention to investigate this complaint and requested copies of the information at issue.
8. By a letter of 21 May 2013, IRD provided a report to the Ombudsman and copies of the information at issue. IRD submitted that:
  - section 81(1) of the TAA applied to the information, and thus it was entitled to withhold the information under section 18(c)(i) of the OIA; and

- it was also entitled to withhold the information under section 9(2)(h) of the OIA in order to maintain legal professional privilege.
9. After considering the information at issue, IRD's reasons for withholding it and the complainant's views, in May 2014 I formed a provisional opinion on the complaint and provided it to IRD and the complainant for comment.
  10. The complainant and IRD provided advice in June 2014 to the effect that they accepted my provisional opinion. The complainant provided some further comments for my consideration.

## Analysis and findings

### Information at issue

11. The information at issue consists of three legal opinions:
  - an opinion of 19 June 2012 from an IRD senior solicitor to four IRD officials;
  - an opinion of 26 July 2010 from an IRD solicitor to an IRD Group Manager; and
  - an opinion of 5 July 2010 from an external legal adviser retained by Burleigh Evatt Consulting Ltd.

### Section 81(1) Tax Administration Act 1994

12. Subject to certain exceptions, section 81(1) of the TAA provides:

*"An Inland Revenue officer must maintain, and must assist in maintaining, the secrecy of all matters relating to the legislation described in subsection (1C), and the officer must not communicate any such matter, except for the purpose of carrying into effect that legislation or under subsection (1B)."*

### Section 18(c)(i) Official Information Act 1982

13. Section 18(c)(i) of the OIA provides that a request may be refused where –

*"the making available of the information requested would ... be contrary to the provisions of a specified enactment."*

## Section 52(3)(b)(i) Official Information Act 1982

14. Subject to certain exceptions, section 52(3)(b)(i) of the OIA provides:

*“ ... nothing in this Act derogates from ... any provision which is contained in any other Act of Parliament ... which ... imposes a prohibition or restriction in relation to the availability of official information.”*

15. Where section 81(1) of the TAA applies, it would be contrary to section 18(c)(i) of the OIA for IRD to release the information requested. Under section 52(3)(b)(i) of the OIA, section 81(1) is *“a prohibition or restriction in relation to”* making available the information at issue. IRD accepts that the information at issue is official information as, in terms of section 2 of the OIA, it holds that information. The question for determination is whether the section 81(1) prohibition applies to the information at issue.

16. There are a number of exceptions to the section 81(1) prohibition enabling or permitting IRD to release information. Given the nature of the information in issue, it is necessary for me to consider only one of those exceptions:

- whether the releasing of the information at issue would be *“for the purpose of carrying into effect”* the legislation referred to in section 81(1).

17. Subject to the exceptions specified in section 81 of the TAA, Inland Revenue officers must maintain *“secrecy of all matters relating to the legislation described in”* section 81(1C) of the TAA. Unquestionably, the information at issue relates to the legislation described in section 81(1C). The opinions relate to Inland Revenue Acts and other statutes administered by IRD, namely the Child Support Act 1991 (CSA) and the Student Loan Scheme Act 1992 (SLSA). Accordingly, I must consider whether IRD’s decision not to exercise its discretion under the relevant section 81(1) exception was reasonably open to them.

18. It might be argued that the information at issue is within the section 81(1) exception. The improved and greater collection of money owed under the Inland Revenue Acts, the CSA and the SLSA by outsourcing certain work could be said to be *“for the purpose of carrying into effect”* those Acts. In a general sense, the *“effect”* of that legislation is to impose obligations on those subject to it to pay money to the State, or to make returns of income to IRD for the assessment of tax payable.

19. The interpretation of the section 81(1) secrecy obligation and the scope of the exceptions (and the interpretation of the predecessor provision, section 13 of the Inland Revenue Act 1974 (IRDA)) have been considered by the Ombudsmen and the Courts.

20. In the *“Report of the Ombudsmen”* of 21 December 1999 to the House of Representatives, Chief Ombudsman Sir Brian Elwood and Ombudsman Judge Anand Satyanand reported on the policy and procedures adopted by IRD to hold and use its official information and process requests for official information. They discussed a number of judicial decisions concerning the appropriate interpretation of section 13 of

the IRDA. I agree with their view that the reasoning in these decisions applies with equal force to section 81 of the TAA, as both provisions use similar terminology.

21. There are certain differences between the two provisions. For example, section 81 contains a number of exceptions to the section 81(1) secrecy obligations not present in section 13. Further, the IRDA contained no equivalent provision to section 6 of the TAA, which imposes a duty on Ministers and officials to protect “*the integrity of the tax system*”. However, the thrust of both provisions is the same: subject to certain exceptions, IRD must keep secret matters falling within section 81(1)’s ambit.
22. The expression found in the section 81(1) exception – “*except for the purposes of carrying into effect*” – was also present in section 13 of the IRDA. Both the Court of Appeal and the Supreme Court have considered that expression.
23. In referring to the purpose of section 13 of the IRDA, the Court of Appeal stated:<sup>1</sup>

*“Without an army of inspectors a tax system inevitably depends very substantially on the willingness of taxpayers to provide proper and timely tax information to the Revenue. As Lord Wilberforce observed in R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, 633, the total confidentiality of assessments and of negotiations between individuals and the Revenue is a vital element in the working of the system. It rests on the assurance provided by stringent official secrecy provisions that the tax affairs of taxpayers are solely the concern of the Revenue and the taxpayers and will not be used to embarrass or prejudice them.*

*That fundamental premise underlies the secrecy provisions of the income tax legislation in New Zealand as in other countries and is reflected in the very limited disclosure provisions contained in standard double tax treaties.”*

24. The Court of Appeal’s decision in *Fay Richwhite and Co Limited v Davison*<sup>2</sup> distinguished between the “*stringent official secrecy provisions*” referred to in the *Knight* case, in the context of taxpayers’ affairs and the fact scenario before it. It held the Commissioner had to give evidence before a Commission of Inquiry since his integrity (which was called into question in that case) was of the utmost importance to public confidence and the effectiveness of IRD in “*carrying into effect*” the tax Acts. Accordingly, it is appropriate here to take into account that the information at issue does not concern the personal tax affairs of taxpayers or those liable to make payments under the CSA and the SLSA.

---

<sup>1</sup> *Knight v Commissioner of Inland Revenue* [1991] 2 NZLR 30 at 39 per Richardson J.

<sup>2</sup> [1995] 1 NZLR 517.

25. In a recent decision, the Supreme Court stated:<sup>3</sup>

*“... the permitted use exception in s81(1) is a qualified one. Disclosure is not permitted unless, and to the extent that, it is reasonably necessary for the performance of the Commissioner’s statutory functions.”*

26. With reference to section 81(1) of the TAA, IRD stated in its report to the Ombudsman:

*“The general secrecy obligation imposed on every Inland Revenue officer, to maintain and assist in maintaining the secrecy of all matters relating to the Inland Revenue Acts, contains words of wide import and, in our view, means that the secrecy obligation is not limited to information Inland Revenue holds about specific taxpayers. Information about Inland Revenue’s systems, processes and policies is also clearly covered by the secrecy obligation, where these concern matters relating to the Inland Revenue Acts. The documents at issue concern Inland Revenue policies, which are matters relating to the Inland Revenue Acts.”*

27. I accept that information about IRD’s systems, processes and policies are potentially within the section 81(1) secrecy obligation; however, the three legal opinions are of a somewhat different nature. They are legal advice intended to inform IRD systems, processes and policies.

28. The internal opinions were confidential legal advice on IRD’s proposal to outsource certain work. Although the external legal adviser’s opinion is addressed to Burleigh Evatt, I am satisfied that it was for the same purpose. The information at issue clearly relates to legislation described in section 81(1C) of the TAA and thus falls within the ambit of section 81(1).

29. I conclude that:

- while the release of the information at issue might arguably carry into effect the legislation described in section 81(1C) of the TAA or assist in achieving that purpose, the purpose of the legal advice was to inform IRD whether its proposal to outsource certain work was lawful, *not* to carry into effect the described legislation;
- the section 81(1) exception did not apply to the information at issue; and
- section 81(1) of the TAA obliged IRD to keep the information at issue secret and to withhold it under section 18(c)(i) of the OIA.

30. I note the complainant’s submission in response to my opinion:

1. *“As stated in my complaint ... I considered it was in the public interest that the relevant legal opinions should be released. I remain of that view. The IRD’s proposals effectively mean that non-IRD staff will be given the authority to contact taxpayers about their tax affairs. As the*

---

<sup>3</sup> *Westpac Banking Corporation Ltd v Commissioner of Inland Revenue* [2008] 2 NZLR 709, 733 (para [69]).

*power to levy and collect tax is one of the most fundamental powers of government, any step to outsource those powers should be subject to stringent scrutiny to ensure the necessary relevant authority exists.*

2. *I believe your interpretation of section 81(1C) of the Tax Administration Act 1994 is too narrow and I do not believe sufficient weight has been given to the issue of protecting the integrity of the tax system. I am personally of the view that outsourcing of core tax collection functions would be harmful to the integrity of the tax system."*

31. I have considered the complainant's comments, but am not persuaded from my opinion that section 81(1) of the TAA obliged IRD to keep the information at issue secret and thus IRD was entitled to withhold it under section 18(c)(i) of the OIA.

## **Section 9(2)(h) Official Information Act 1982**

32. IRD also relied on section 9(2)(h) of the OIA which provides "*good reason*" to withhold information "*if, and only if, the withholding of the information is necessary to ... maintain legal professional privilege*".

33. Reliance on the section 9(2)(h) withholding ground is subject to the section 9(1) public interest override, where:

*"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."*

34. The strength of legal professional privilege has often been recognised by the courts and its principles are well settled. Glazebrook J, in delivering the judgment of the Court of Appeal in *Shannon v Shannon*<sup>4</sup> referred to the Privy Council's advice in *B v Auckland District Law Society*<sup>5</sup> and stated:<sup>6</sup>

*"[36] ... legal professional privilege is more than an ordinary rule of evidence. It is a fundamental condition on which the administration of justice as a whole rests and is not for the benefit of any particular client but in the wider interests of all those who might otherwise be deterred from telling the whole truth to their solicitors.*

*[37] The Privy Council rejected any suggestion that there should be a balancing exercise when considering the admissibility of privileged material ... legal profession privilege is itself the product of a balancing exercise between public interests whereby, subject to the well-recognised crime or fraud exception, the public interest in the perfect administration of justice is*

---

<sup>4</sup> [2005] 3 NZLR 757.

<sup>5</sup> [2004] 1 NZLR 326.

<sup>6</sup> [2005] 3 NZLR 757 at 766.

*accorded paramountcy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant evidence. ... The rationale is that a lawyer has to be able to give a client an absolute and unqualified assurance that whatever a client reveals in confidence will never be disclosed without the client's consent. Such an assurance is inconsistent with the existence of a balancing exercise."*

35. Whether the legal opinions were internal or external legal opinions makes no difference to the strength of the public interest in the maintenance of legal professional privilege.
36. A further consideration is whether IRD has waived privilege in the advice by its use of the opinions. In *Shannon v Shannon*, with reference to its decision in *Ophthalmological Society of New Zealand Inc v Commerce Commission*,<sup>7</sup> the Court of Appeal stated:<sup>8</sup>

*"[55] ... The test is that set out by this Court in Ophthalmological Society ... and involves an assessment of whether a party's use of privileged material has destroyed confidentiality.*

*[56] ... The Court [in the Ophthalmological Society case] recognised that the fairness factor can be important in cases where there has been partial disclosure of legal advice and the consideration is whether natural justice requires disclosure of the whole advice. What must be assessed objectively in all cases, however, is the consistency of the conduct with maintaining the privilege. That requires close analysis of the particular context, what the issue is in relation to the privilege, how the evidence relates to that issue, and the question of whether there is inconsistency that could lead to injustice if the privilege is upheld. The weight to be given to fairness will depend on the circumstances, including the character of the privilege said to have been waived."*

37. There is no evidence that IRD has waived its privilege or "destroyed confidentiality" in the privileged material by the manner in which it has used or referred to the advice given in the legal opinions. I asked IRD whether it was aware of any occasion on which an IRD officer or the Minister of Inland Revenue had referred to the information at issue other than by making a simple reference to receiving legal advice supporting the proposals in question. IRD advised in February 2014 that it had found no such reference to the information at issue, noting:

*"all parliamentary questions, reports to the Minister and Ministerial correspondence that Inland Revenue has been a party to since the opinions were received, have been checked."*

38. In considering whether the section 9(1) public interest override applies, I have taken into account that members of the public may well be interested in knowing the overall tenor

---

<sup>7</sup> [2003] 2 NZLR 145.

<sup>8</sup> [2005] 3 NZLR 757 at 770.

of legal advice provided by government agencies subject to the OIA. There may be exceptional cases where, for reasons of transparency and accountability of statutory decision makers, the public interest supports disclosure of a high level summary of legal advice. That might be the case in relation to a high profile decision of the Crown not to lay criminal charges. However, I see no exceptional reasons not to uphold legal professional privilege in the present case.

39. Accordingly, even if I am wrong in my view that making the information available is prohibited by section 81(1) of the TAA, I am satisfied that IRD had good reason to withhold the information pursuant to section 9(2)(h) of the OIA and IRD's refusal of the request on that basis was justified.

## Ombudsman's opinion

40. For the reasons set out above, I conclude:
- a. IRD was obliged to withhold the information at issue under section 81(1) of the TAA. Accordingly, under section 18(c)(i) of the OIA, IRD was entitled to refuse the complainant's request for that information; and
  - b. in any event, IRD was entitled to withhold the information at issue under section 9(2)(h) of the OIA.

## Appendix 1. Relevant statutory provisions

### Official Information Act 1982

#### 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 of this Act, 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 –
  - ...
  - (h) maintain legal professional privilege;
  - ...

#### 18 Refusal of requests

A request made in accordance with section 12 may be refused only for 1 or more of the following reasons, namely:

- ...
- (c) that the making available of the information requested would –
  - (i) be contrary to the provisions of a specified enactment;
  - ...

#### 52 Savings

- ...
- (3) Except as provided in sections 50 and 51, nothing in this Act derogates from –
  - ...
  - (b) any provision which is contained in any other Act of Parliament or in any regulations within the meaning of the Regulations (Disallowance) Act 1989 (made by Order in Council and in force immediately before 1 July 1983) and which –
    - (i) imposes a prohibition or restriction in relation to the availability of official information;
    - ...

## Tax Administration Act 1994

### 6 Responsibility on Ministers and officials to protect integrity of tax system

- (1) Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts are at all times to use their best endeavours to protect the integrity of the tax system.
- (2) Without limiting its meaning, **the integrity of the tax system** includes –
  - (a) Taxpayer perceptions of that integrity; and
  - (b) The rights of taxpayers to have their liability determined fairly, impartially, and according to law; and
  - (c) The rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and
  - (d) The responsibilities of taxpayers to comply with the law; and
  - (e) The responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and
  - (f) The responsibilities of those administering the law to do so fairly, impartially, and according to law.

### 81 Officers to maintain secrecy

- (1) An Inland Revenue officer must maintain, and must assist in maintaining, the secrecy of all matters relating to the legislation described in subsection (1C), and the officer must not communicate any such matter, except for the purpose of carrying into effect that legislation or under subsection (1B).
- (1B) Despite subsection (1), an Inland Revenue officer may communicate a matter if –
  - (a) the communication is for the purpose of executing or performing a duty of the Commissioner, or for the purpose of supporting the execution or performance of such a duty; and
  - (b) the Commissioner considers that such communication is reasonable with regard to the relevant purpose described in paragraph (a), and with regard to the following:
    - (i) the Commissioner's obligation at all times to use best endeavours to protect the integrity of the tax system; and
    - (ii) the importance of promoting compliance by taxpayers, especially voluntary compliance; and

- (iii) any personal or commercial impact of the communication; and
- (iv) the resources available to the Commissioner; and
- (v) the public availability of the information.

(1C) For the purposes of subsection (1), the legislation is –

- (a) the Inland Revenue Acts, or another Act that is or was administered by or in Inland Revenue:
- (b) the Accident Compensation Act 2001, the Accident Compensation Act 2001, the Accident Insurance Act 1998, the Accident Rehabilitation and Compensation Insurance Act 1992, or the Accident Compensation Act 1982:
- (c) the New Zealand Superannuation Act 1974:
- (d) any Act that imposes taxes or duties payable to the Crown.

...

(3) Without limiting the generality of subsections (1) and (1B), no officer of the Department shall be required to produce in any Court or tribunal any document or to divulge or communicate to any Court or tribunal any matter or thing coming under the officer's notice in the performance of the officer's duties as an officer of the Department, except when it is necessary to do so for the purpose of –

- (a) Carrying into effect –
  - (i) The Inland Revenue Acts, including all Acts, whether repealed or not, at any time administered by the Department; or
  - (ii) The Accident Compensation Act 1982 or the Accident Rehabilitation and Compensation Insurance Act 1992 or the Accident Insurance Act 1998 or the Accident Compensation Act 2001; or
  - (iii) Any other enactment imposing taxes or duties payable to the Crown; or
- (b) Carrying into effect the powers, duties, and functions of the Commissioner under the New Zealand Superannuation Act 1974.

...

(8) In this section,–

- (a) **Inland Revenue officer**, –
  - (i) means a person who is employed in the service of Inland Revenue; and
  - (ii) includes –

- (A) a person employed in the service of the Government of an overseas country or territory who is for the time being attached or seconded to Inland Revenue:
  - (B) a person formerly employed in the service of Inland Revenue:
- (b) **duty of the Commissioner** includes a power of the Commissioner and also a function of the Commissioner, as well as anything done within the law to –
- (i) administer the tax system:
  - (ii) implement the tax system:
  - (iii) improve, research, or reform the tax system.