

Request for information relating to Whanganui River Iwi Treaty of Waitangi negotiations

Legislation:	Official Information Act 1982, s 9(2)(j) (see appendix for full text)
Requester	Mike Plowman
Agency:	Ministry of Justice – Office of Treaty Settlements
Ombudsman:	Dame Beverley Wakem DNZM, CBE
Reference number:	288181
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Summary

Mr Michael Fennessy of Innes Dean Tararua Law Ltd, on behalf of his client, Mr Mike Plowman, requested copies of certain documents relating to the Crown’s negotiations with Whanganui Iwi regarding “*water co-management or proposals for water co-management*”. The Office of Treaty Settlements (OTS), which is part of the Ministry of Justice, withheld the information at

issue under section 9(2)(j) of the Official Information Act 1982 (OIA) on the basis that its release would prejudice or disadvantage the Crown's negotiations with the Whanganui Iwi in relation to their Whanganui River and land claims. During my investigation, the OTS undertook to release redacted versions of certain documents forming part of the information at issue.

Based on the information provided to me, I have concluded that the OTS was entitled to withhold the balance of the information at issue under section 9(2)(j) 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 subject to the OIA refuses to make official information available when requested. The Ministry of Justice is subject to the OIA. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused.

Background

Request

2. On 9 November 2009 Mr Fennessy wrote to the OTS requesting:
 - *“copies of any letter, faxes, emails or other correspondence between the Prime Minister and/or the Office of Treaty Settlements on the one hand and the Hinengakau Development Trust and/or Archie Tairoa on the other regarding water co-management and/or related issues and any negotiations related to those matters”; and*
 - *“any letter from the then Prime Minister Helen Clark to Hinengakau Development Trust and/or Archie Tairoa regarding these matters and dated in or around 2005 is included.”*
3. On 9 December 2009, the OTS replied that no such information was held.
4. On 29 January 2010, Mr Fennessy emailed the OTS to broaden his request to include:

“any letters, faxe[s], emails or other correspondence between the Prime Minister, or any other Minister (or any representative of the Prime Minister or other Minister) and/or the Office of Treaty Settlements on the one hand and any Whanganui Iwi (or representative of any Whanganui Iwi) on the other hand, regarding water co-management or proposals for water co-management.”

5. In a letter of 2 March 2010 to Mr Fennessy, the OTS identified in a table attached to that letter three documents within Mr Fennessy's request and stated:

"The negotiations in 2004 between the Crown and Whanganui Iwi to settle the Whanganui River claim were never concluded. The Crown and Whanganui Iwi have recently recommenced negotiations. The Whanganui River negotiation, and correspondence related to it, is therefore currently active. The correspondence identified in the attached table has been withheld to enable a Minister of the Crown or any Department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations."

6. On 19 March 2010, Mr Fennessy wrote to the OTS asking it to reconsider its decision to withhold the information it had then identified on the basis that, in his view, the OTS had not taken into account the following points:

- a. *"The principle of availability under section 5 of the Act (applies because the reason given for withholding the information is in section 9). This is particularly so given the importance of water and rivers and the public interest in them and their management.*
- b. *Section 17 of the Act which applies where the 'information requested is comprised in a document'. It seems unlikely that [it] is necessary to withhold whole documents concerned under section 9(2)(i) of the Act.*
- c. *The age of the documents which suggests that it is unnecessary to withhold them to allow negotiations to be conducted without prejudice or disadvantage.*
- d. *The prejudice or disadvantage that might be suffered if the documents were disclosed is not clear."*

7. Despite Mr Fennessy's submissions in his letter of 19 March 2010, the OTS confirmed its decision to withhold the information it then identified as being within his request.

8. Subsequently, the OTS clarified it was relying on section 9(2)(j) of the OIA to withhold the information at issue, not section 9(2)(i).

Complaint

9. In a letter of 6 May 2010 to this Office, Mr Fennessy made a complaint about the decision by the OTS to withhold the three documents then identified as being within his request and the information at issue. For the purposes of this opinion, I have treated the complaint as applying also to the other documents the OTS later identified as being part of the information at issue.

10. In his letter of 6 May 2010, Mr Fennessy drew my attention to:

- a. *"Sections 4 and 5 of the [OIA] and, in particular, the purposes set out in [section] 4(a). The Office of Treaty Settlements may well be conducting*

negotiations in respect of Whanganui River and Te Awa Tupua Whanganui claims but the Office of Treaty Settlements is still accountable to Parliament. Furthermore, that these negotiations are, it appears, being held in secret could hardly be said to enhance respect for the law and to promote the good government of New Zealand when the outcome of the negotiations may affect the country for many years to come.

- b. *The age of the documents and the fact that Waitangi Tribunal hearings of the Whanganui claim are ongoing and have been for some time. These circumstances beg the question as to what the current relevance of the documents can be to negotiations and how their disclosure could prejudice or disadvantage the ability of the Office of Treaty Settlements to carry on negotiations. In addition, the recipients of the letters are presumably parties to the negotiations so as between those parties and the Crown there can be no prejudice or disadvantage by the disclosure of the documents.”*

Investigation

11. In a letter of 18 August 2010, this Office notified the OTS of my intention to investigate this complaint and requested copies of the information at issue.
12. By a letter of 23 September 2010, the OTS provided a report to this Office and copies of the three documents it then identified as being the information at issue.
13. During the course of my investigation, the OTS provided copies of further documents which it identified as being part of the information at issue.
14. After considering the information at issue, the OTS reasons for withholding it, and the complainant's views, in June 2014 I formed a provisional opinion on the complaint and provided it to the OTS and the complainant for comment.
15. In a letter of 25 July 2014, the OTS provided comments on my provisional opinion.
16. In a letter of 6 August 2014, Mr Fennessy provided comments on my provisional opinion.

Analysis and findings

Information at issue

17. The information at issue, being the information originally, and later, identified as falling within Mr Fennessy's request, consists of 9 documents:

- a. a letter of 4 March 2004 from the then Minister in charge of Treaty of Waitangi negotiations, Hon Margaret Wilson, to the Te Awa Tupua Negotiating Committee;
- b. a letter of 5 May 2004 from Hon Margaret Wilson to the Te Awa Tupua Negotiating Committee;
- c. a letter of 16 July 2004 from the Whanganui River Maori Trust Board to the Minister in Charge of Treaty of Waitangi Negotiations;
- d. a letter of 2 April 2004 from Sir Archie Taiaroa to the Minister in charge of Treaty of Waitangi negotiations, Hon Margaret Wilson;
- e. a letter of 2 April 2004 from the OTS Manager (Mr Dean Cowie) to Sir Archie Taiaroa;
- f. a letter of 2 April 2004 from the OTS Manager (Mr Dean Cowie) to Sir Archie Taiaroa on behalf of the Minister of Treaty of Waitangi negotiations, Hon Margaret Wilson.
- g. a letter of 7 April 2004 from Hon Margaret Wilson addressed to Whanganui River Maori Trust Board for Te Awa Tupua Negotiating Committee;
- h. a paper dated 1 April 2004 signed on behalf of the Te Awa Tupua Negotiating Committee; and
- i. a letter of 24 June 2004 from Hon Margaret Wilson to Te Awa Tupua Negotiating Committee.

Section 9(2)(j) Official Information Act 1982

18. Section 9(2)(j) of the OIA provides good reason for withholding official information –
 - a. *“if, and only if, the withholding of the information is necessary to ... enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations)”*; and
 - b. this interest is not, in terms of section 9(1) of the OIA, *“outweighed by other considerations which render it desirable, in the public interest, to make that information available”*.
19. Both of these elements must be satisfied before section 9(2)(j) provides a good reason for refusing a request.
20. In its letter of 23 September 2010 to this Office, the OTS stated:

“On 21 April 2010 OTS wrote to Mr Fennessy confirming the decision to withhold the information under section 9(2)(j) of the Act and advised that in relation to the four matters identified:

- a. *The public interest in achieving settlement with Whanganui Iwi of the Whanganui River claim and allowing the Whanganui River negotiation to continue without potential prejudice or disadvantage outweighs the potential public interest in releasing the information at this stage.*
- b. *All of the information in the documents relate to the Whanganui River negotiation. We have decided to withhold all of the information in the documents to allow the Whanganui River negotiation to continue without prejudice or disadvantage.*
- c. *The age of the documents is irrelevant to the decision. The Whanganui River negotiation is currently active, the correspondence relates to that negotiation, and its release at this time would prejudice or disadvantage that negotiation.*
- d. *The information in the documents is specific to the negotiation between the Crown and Whanganui Iwi to settle their historical Treaty claim to the Whanganui River. The information has been withheld to enable the Minister for Treaty of Waitangi Negotiations and OTS to carry on, without prejudice or disadvantage, negotiations, in particular, the Whanganui River negotiation.*

...

Third parties that might be adversely affected by disclosure of the information

The information requested has been withheld to enable the Minister for Treaty of Waitangi Negotiations and OTS to carry on, without prejudice or disadvantage, negotiations with Whanganui Iwi.

The negotiations in 2004 between the Crown and Whanganui Iwi to settle the Whanganui River claim were never concluded. The Crown and Whanganui Iwi have recently reengaged in negotiations and the correspondence related to it is therefore 'current'. The information withheld refers to highly sensitive negotiating positions on settlement redress for the Whanganui River claim. The Crown and Whanganui Iwi have yet to reach agreement on a settlement package including resolving and reconciling those negotiating positions.

Disclosure of the information withheld would adversely affect the negotiating relationship between the Crown and Whanganui Iwi due to exposure of both parties' negotiating positions. A breakdown in this negotiating relationship would result in delays or stalled progress towards agreement of a settlement package.

Also, the Whanganui River is a significant natural resource of national significance. Negotiations regarding decision-making in relation to the River have implications for a wide range of stakeholders. Disclosure of the

information withheld is likely to generate concern by stakeholders unnecessarily and this would make negotiations more difficult."

21. In a letter of 3 March 2011 to this Office, Mr Fennessy commented on the reasons the OTS had provided in support of its reliance on section 9(2)(j) to withhold the information at issue. In particular, he referred to the following matters:
 - a. The OTS had not identified, in terms of the Ombudsman's Guidelines, the prejudice or disadvantage that it believed would result to those negotiations by the disclosure of the information at issue;
 - b. The age of the documents requested and, with the lapse of time, the fact that there were now different persons representing the Crown and the Whanganui Iwi made it *"most unlikely that the information requested has significant relevance to the actual issues now under negotiation"*;
 - c. The disclosure of the information at issue would promote the following considerations:
 - i. *"The interests of a large segment of the public, particularly in the Ruapehu District, in the outcome of the negotiations and also in the process by which the Crown has gone about negotiating the proposed settlement."*
 - ii. *"The need for the public, particularly in a democratic society, to have knowledge and understanding of how government conducts negotiations, which negotiations are ultimately conducted on behalf of the public"*;
 - d. While the OTS had stated that the *"the details of settlements are always disclosed at the interim ... stage so there is an opportunity for wider consultation on the redress across interested parties"*, Mr Plowman's present interest was in the process of the settlement negotiations, rather than in the details of the proposed settlement which would become available in due course;
 - e. It was in the public interest in terms of section 9(1) that the information at issue should be disclosed, even if there was good reason under section 9(2)(j) to withhold the information at issue; and
 - f. *"The ability to [have] access to ... official information is a right and neither a privilege nor a courtesy"* and the identity of the requester *"is likely to be of very limited, if any, relevance in considering whether or not the information may be withheld"*.
22. Having read the documents at issue, I am satisfied that they all form part of the background to the negotiations between the Crown with the Whanganui Iwi in respect of their claims under the Treaty of Waitangi in relation to the Whanganui River.
23. During the course of my investigation, there were a number of developments in the negotiations between the Crown and the Whanganui Iwi.

24. The OTS released a 'Record of Understanding' dated 13 October 2011 between the Crown and Whanganui Iwi in relation to the Whanganui River, and the 'Tūtohu Whakatupua' agreement dated 30 August 2012 between the Crown and Whanganui Iwi. The purpose of that agreement was:

"to progress the development of agreed Te Awa Tupua arrangements as part of the settlement of the historical Treaty of Waitangi Claims of Whanganui Iwi in respect of the Whanganui River."

25. In a letter of 15 October 2013 to this Office, the OTS confirmed its decision to withhold the information at issue and stated:

- a. *"The public interest in achieving settlement with Whanganui Iwi of the Whanganui River claim and allowing the Whanganui River negotiation to continue without potential prejudice or disadvantage outweighs the potential public interest in releasing the information at this stage;*
- b. *The age of the documents is irrelevant to the decision. The Whanganui River Negotiation is currently active, the correspondence relates to that negotiation, and its release at this time would prejudice or disadvantage that negotiation;*
- c. *Disclosure of the information withheld would adversely affect the negotiating relationship between the Crown and Whanganui Iwi due to exposure of the negotiating positions of both parties. A breakdown in this negotiating relationship would result in delays or stalled progress towards agreement of a settlement package; and*
- d. *Negotiations regarding decision-making in relation to the River have implications for a wide range of stakeholders. Disclosure of the information withheld is likely to generate concern by stakeholders unnecessarily and this would make negotiations more difficult."*

26. In response to this Office's request to the OTS to reconsider its decision to withhold the information at issue in the light of the attainment of two significant milestones, the Record of Understanding and the Tūtohu Whakatupua, the OTS in its letter of 15 October 2013 stated:

"... despite reaching these milestones, the Crown and Whanganui Iwi have yet to reach agreement on a settlement package for the River. The information withheld refers to highly sensitive negotiating positions on settlement redress and disclosure of this information would likely adversely affect the negotiating relationship between the Crown and Whanganui Iwi. Therefore OTS upholds its initial decision to withhold the information under section 9(2)(j) of the Act."

27. In an email of 13 March 2014 to this Office, essentially for the same reasons earlier given in correspondence with this Office, the OTS re-confirmed its decision to withhold the information at issue.
28. On 26 March 2014, the Minister for Treaty of Waitangi negotiations, Hon Christopher Finlayson, announced that the Crown and Whanganui Iwi negotiators had initialled the Whanganui River Deed of Settlement and Te Awa Tupua Framework Document which, if agreed to by the Whanganui Iwi members through a ratification process, would settle historical Treaty of Waitangi claims relating to the Whanganui River.
29. On 5 August 2014, Hon Christopher Finlayson made the following announcement:
- “The Crown and Whanganui Iwi have signed the Whanganui River Deed of Settlement ‘Ruruku Whakatupua’ ... The Deed of Settlement settles the historical Treaty of Waitangi claims of Whanganui Iwi in relation to the Whanganui River.*
- Under the Settlement, Whanganui Iwi will receive \$81 million financial redress, and the Whanganui River will be recognised as a legal entity known as ‘Te Awa Tupua’, an integrated and living whole from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements.*
- Te Awa Tupua will have its own legal standing and an independent voice, and Crown-owned riverbed will vest in that legal entity. The Te Awa Tupua framework will bring together Iwi and the wider community to advance the future health and wellbeing of the River.”*
30. The OTS has placed on its website a copy of the Whanganui River Deed of Settlement, ‘Ruruku Whakatupua’.
31. In a letter of 6 August 2014 to this Office, Mr Fennessy provided extensive submissions in support of his client’s contention that the information at issue should be released. In these submissions he referred to matters he had raised in correspondence with this Office, such as in his letter of 3 March 2011.
32. In his submissions, Mr Fennessy stated:
- “In particular, it is submitted that the submissions regarding the purpose of the OIA and the public interest in disclosure are just as relevant now that the ... negotiations that the OTS says would have been prejudiced by disclosure have now more or less concluded with agreed of the Settlement Documents. It is submitted that with negotiations completed it is difficult to understand how, given the purposes of the OIA and section 9(2), disclosure is still not appropriate and why the negotiating positions of the Crown and Whanganui Iwi from 10 years ago should remain secret.”*

33. In a letter of 24 September 2014 to this Office, the OTS (Mr Kevin Kelly) advised that, in the light of the signing of the Whanganui River Deed of Settlement, it had decided to release redacted versions of the documents described in paragraph 17a-f.
34. The OTS advised that, prior to determining to release part of the redacted documents, it had consulted with the Whanganui Iwi which expressed no objection to their release.
35. The OTS has since undertaken to this Office to release the redacted versions. Having read the redacted documents, I accept that they will not throw much light (if any) on the matters referred to in Mr Fennessy's request, as very little of the content of the entire documents remains in the redacted versions.

36. In his letter of 24 September 2014, Mr Kelly stated:

"[The Deed of Settlement] relates to Whanganui Iwi claims in respect of the river only. The Deed does not complete the settlement process with Whanganui Iwi in respect of their river claims as the Crown is still negotiating with Whanganui Iwi to develop settlement legislation to give effect to the Deed of Settlement. Nor does the Deed represent any form of agreement between the Crown and Whanganui Iwi in respect of their land claims. As such, the historical Treaty claims of Whanganui Iwi remain to be settled in full.

...

... However, in our view, most of the content in the documents remains sensitive to negotiations and should be withheld under section 9(2)(j) to enable the Crown to finalise settlement legislation for the river claims and to negotiate the remaining claims with the Whanganui Iwi without prejudice or disadvantage. We have also determined that some parts of these documents contain information that is outside the scope of the request. ...

The release of the information that we have determined still falls within section 9(2)(j) would reveal the negotiating positions of Whanganui Iwi and the Crown at a sensitive time. ...

Releasing information about a sensitive stage of this negotiation would be contrary to the confidential and private basis in which we have agreed to negotiate with Whanganui Iwi. It would damage Whanganui Iwi trust in the Crown and create reluctance to share information, making it difficult to negotiate in an open and transparent manner. This would prejudice the Crown's ability to finalise settlement legislation for the river claims as well as its ability to negotiate settlement of Whanganui Iwi land claims."

37. The settlement legislation giving effect to the Deed of Settlement has yet to be passed by Parliament.

38. There will thus be continuing negotiations between the Crown and Whanganui Iwi relating to the form of legislation settling the claims of Whanganui Iwi in relation to the Whanganui River and their land claims.
39. While it accepts that its letter of 24 September 2014 to this Office must be read in the light of the information which has now been released concerning the Deed of Settlement, subject to that, the OTS considers the views expressed in that letter support its continued withholding of the balance of the information at issue under section 9(2)(j).

Application of section 9(2)(j) to information at issue

40. The OTS has identified the specific negotiations which, in its view, are likely to be prejudiced by the release of the information at issue, that is, the Crown's continuing negotiations with the Whanganui Iwi relating to the Whanganui River as earlier described and their land claims. These negotiations are clearly within the expression "*negotiations*" found in section 9(2)(j).
41. While the Crown and the Whanganui Iwi have set out the terms of settlement concerning the Whanganui Iwi claims to the Whanganui River in the Deed of Settlement, they have not yet agreed on all the details of the settlement legislation to be presented to Parliament giving effect to that Deed. Further, the Deed does not settle the Whanganui Iwi land claims. In these respects, the negotiations between the Crown and the Whanganui Iwi remain very much on-foot.
42. Having reviewed the information at issue, I am satisfied that, despite the age of the documents concerned, these documents still form part of the context of the negotiations, although that may not always be the case. And it is in the context of the negotiations and the lengthy background to the negotiations that those documents must be viewed.
43. I am satisfied that the release of the information at issue other than the information the OTS has now agreed to release (the balance of the information at issue), would be detrimental to the negotiations. There is a real risk that the Crown's ability to finalise its negotiations with the Whanganui Iwi about outstanding issues would be prejudiced or disadvantaged if the balance of the information is now released. There are still many sensitive issues to be discussed and settled in the negotiations.
44. Further, I am satisfied that the release of the balance of the information at issue would adversely affect the relationship of trust that has now formed between the Crown and the Whanganui Iwi. The undermining of that trust would disrupt and inhibit the negotiation process and prejudice or disadvantage the Crown's ability to continue the negotiations. It must be remembered that the relationship between the Crown and the Whanganui Iwi has, until comparatively recently, been difficult and fraught, as is evidenced by the extensive litigation and discussions between the parties over an extraordinarily long period before the present negotiations commenced.

45. Accordingly, I am satisfied that, in terms of section 9(2)(j), it is necessary for the OTS to withhold the balance of the information at issue to enable the Crown to continue the negotiations with the Whanganui Iwi without prejudice or disadvantage.

Section 9(1) Official Information Act 1982

46. As Mr Fennessy has stressed, there is a public interest in the transparency of negotiations between the Crown and the Whanganui Iwi to settle the Treaty of Waitangi claims of the Whanganui Iwi and that these claims be settled after taking into account the interests of all parties, not just the interests of the Crown and Whanganui Iwi. In correspondence with this Office, Mr Fennessy has made forceful submissions about the public interest in terms of section 9(1) in knowing the content of the information at issue.
47. The public interest under section 9(1) of the OIA has been partly met by the disclosure of the 'Record of Understanding' and the 'Tūtohu Whakatupua' agreement, which record the progress then made in the negotiations, and now by the release of the initialled Whanganui River Deed of Settlement and Te Awa Tupua Framework Document.
48. The public will be entitled to make submissions to the parliamentary Select Committee considering the Bill presented to Parliament to give effect to the Deed of Settlement. That right goes some way also to satisfying the public interest under section 9(1).
49. I have concluded there is a real risk that the release of the balance of the information at issue will harm the relationship between the Crown and the Whanganui Iwi and thus detrimentally affect the Crown's ability to finalise its negotiations with the Whanganui Iwi. It is not in the public interest that the relationship of trust between the Crown and the Whanganui Iwi be harmed with a potential detrimental effect on the negotiations. It is in the wider public interest that the Crown maintains the trust and confidence of the Whanganui Iwi in their negotiations with the Crown and these negotiations are brought to completion in that spirit of trust and confidence.
50. Accordingly, I am of the opinion that the interest protected by section 9(2)(j) in relation to the balance of the information at issue is not, in terms of section 9(1), *"outweighed by other considerations which render it desirable, in the public interest, to make that information available."*

Chief Ombudsman's opinion

51. For the reasons set out above, I conclude:
- a. the OTS was entitled to withhold the information at issue (other than the information it has now agreed to release) under section 9(2)(j) of the OIA; and
 - b. the interest protected by section 9(2)(j) is not, in terms of section 9(1) of the OIA, outweighed by other considerations rendering it desirable in the public interest to make available the balance of the information at issue.

Appendix: Relevant statutory provisions

Official Information Act 1982

4. Purposes

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

- (a) to increase progressively the availability of official information to the people of New Zealand in order—
 - (i) to enable their more effective participation in the making and administration of laws and policies; and
 - (ii) to promote the accountability of Ministers of the Crown and officials,—
and thereby to enhance respect for the law and to promote the good government of New Zealand:
- (b) to provide for proper access by each person to official information relating to that person:
- (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

5. Principle of availability

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

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—
 - ...
 - (j) enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations)